JOF
JPX
BBp

Prince Edward Island. Courts

REPORTS

OF

CASES

DETERMINED IN THE

SUPREME COURT,

Court of Chancery

AND

COURT OF VICE ADMIRALTY

OF

PRINCE EDWARD ISLAND.

BY THE

HONORABLE JAMES HORSFIELD PETERS,
MASTER OF THE ROLLS AND ASSISTANT JUDGE OF THE SUPREME COURT

FROM HILARY TERM, 1850, TO HILARY TERM, 1872.

PREPARED FOR THE PRESS

BY THE HONORABLE T. HEATH HAVILAND

BARRISTER AT LAW.

CHARLOTTETOWN.
PRINCE EDWARD ISLAND
PRINTED BY JAMES H. FLETCHER.
1872.

TABLE OF CASES.

ATTORNEY GENERAL *v.* WESTAWAY,—

(Road Compensation—On information against owner of land for preventing opening of new road laid out by Commissioners under 14 *Vic.*, Cap. 1, sec. 14, being opened, it must be alleged that it ran through defendant's land,) 81

BRENAN, MARTIN,—

(Support of poor relations—Son-in-law not liable under 7 *Vic.*, Cap. 7, to support wife's father,) 53

BOURKE *v.* MURPHY,—

(Public Wharf—power of Governor and Council to make regulations under 15 *Vic.*, Cap. 34—cannot impose excessive rates on some boats or head money on passengers going by them—the term vessel does not comprehend boats,) 90

BRENAN *v.* McISAAC,—

(A person employed as a shopman, and who lives in employer's house, liable to conviction under the Servant's Act 3, *Wm.* 4, Cap. 26,) 112

BLACK *v.* SHAW,—

(Absent Debtor Act—Summons to Trustee or Garnishee must be served by Sheriff—none but defendant in the suit can take advantage of a mere irregularity—but a stranger may object to irregularity which renders proceedings void,) 138

BRECKEN & UXOR *v.* WRIGHT,—

(Construction of Will—acquiescence,) 187

BOUCHE *v.* AYLWARD,—

(Merchant Seaman Act 28 *Vic.*, c. 18, s. 22—though jurisdiction of Justices is confined to £50—where Justices to ascertain balance enquired into accounts exceeding £50, Court will not set aside Judgment,) 210

BELL, ROBERT, in the matter of,—

(Appeal from Insolvent Court—to sustain a charge of undue preference, the payment or transfer must be voluntary, *i. e.* originating with the debtor—if made in consequence of threat or pressure, or in expectation of procuring further advances, it is not voluntary,) 211

BANK OF P. E. I. *v.* McGOWAN, SHERIFF,—

(Escape—Limit Bond—Where prisoner has given a Limit Bond under 12 *Vic.*, cap. 1, s. 1, and escapes before Bail justify, Debt for, Escape does dot lie against the Sheriff—Action must be under the Statute for a breach of the Bond,) 214

CORMACK *v.* WORREL,—

(Absent Dabtor—Agent may defend first trial without waiving principal's right to rehearing,) 1

COLLEGE, ST. ANDREW'S, *v.* GRIFFIN AND OTHERS,—

(Corporation cannot demise lands by parole,) 56

COMPTON *v.* CROSSMAN,—

(Replevin—One seal to a deed by several grantors sufficient, if it appears that each intended to use it—Until entry Widow has no right to Dower—Where reserved rent was £5 and a *ton of hay* and avowry alleged only the money to be due without acknowledging satisfaction for the hay held no variance,) 125

CALLIGAN, APPLT. *v.* HOBKIRK, RESPDT.,—

(Highway—to constitute right of way by user short of 20 years, evidence must shew owner's intention to dedicate — Where A grants a piece of land to B, and afterwards lays off the residue in Building Lots with Streets for the convenience of his grantees, B acquires no right to use the Streets,) 127

COMPTON *v.* FOPE,—

(Redemption of Land sold for tax under 11 *Vic.*, c. 7, sec. 12—Relation of owner and purchaser—Purchaser not allowed for clearing wild land, nor for cost of new buildings—Purchaser claiming for improvements must prove exactly what each improvement was,) 129

CRESWELL *v.* HUNT,—

(Sheriff's fees—Sheriff levying on land under Execution not entitled to poundage if debt paid to plaintiff before day of sale—*Quaere* if entitled to poundage where land levied on, in any case unless he receives and pays the money,) 136

CAPELL *v.* CAPELL,—

(Judge at Chambers will not discharge a prisoner committed by Court of Governor and Council for contempt in not paying alimony pursuant to decree,) 183

DOE D. COLVILLE & OTHERS *v.* MARTIN,—

(Ejectment—Statutes of Limitations—When tenancy at will merely converted into tenancy at sufferance, owner barred in 20 years from end of first year of tenancy at will.—Acknowledgment of title under 11 Sec. must admit right to possession—Discovery of new evidence—when new trial granted for, in ejectment,) 58

DOE D. TULLIDGE *v.* ORR,—

(Statute of Limitations—of possession—death abroad after may years' absence without receipt of any rents and profits not necessarily a discontinuance of possession—the return of owner who was under disability at passing of Act and who has sold while under such disability—does not determine the disability,) 77

DOE D. YEO *v.* BETTS,—

(Land Tax Sale under 11 *Vic.*, Cap. 7,—Want of Notice of sale cured by the 22 Sec.—Sheriff's deed void if lands not described by metes and bounds at time of sale,) 83

DOE D. WIER *v.* SHAW,—

(Judgment as in case of nonsuit—Plaintiff must shew that the not proceeding to trial according to Notice was not caused by his own negligence,) 135

DOE D. STEWART *v.* McPHEE,—

(Ejectment for want of property to distrain—where bailiff in searching for property to distrain on—in passing hovel asked tenant if it contained property, and he answered, no—held tenant was not estopped on trial from shewing that it contained property,) 165

DOE D. McDONELL *v.* McISAAC,—

(Perpetuity—Determinable Fee—Trustees' Estate—where with respect to the two first trusts, the trustees' estate would only be commensurate with the trusts, but the other trust required the fee—held that the latter trust being void the trustees' estate determined on the expiration of the first trusts,) 236

DUNCAN, HODGSON & ROBERTSON *v.* THE MONTREAL ASSURANCE COMPANY,—

(Policy partly printed and partly written—Insurance—Warranty—time of sailing—Where ship insured in time, policy covering———date of sailing from Liverpool—with liberty to sail from Charlottetown not later than 15th December, sailed from Charlottetown on the 17th of December—held underwriters not liable—policy partly printed and partly written, all must be constructed together if possible, if not the writing prevails. 243

HOWAT *v.* LAIRD,—

(Riparian owner of stream—Has right to the water in its natural course, without interruption in quantity, or retardation of flow—Action lies for injury to right, though no actual damage sustained,) 5

HOWAT *v.* LAIRD,—

(Injunction—Running Water—Mere recovery at Law for injury to right of riparian owner does not *per se*, entitle him to injunction, but equity will restrain if injury substantial or recurring,) 15

HOWAT *v.* LAIRD,—

(Injunction—Equity will restrain owner of Mills on Stream from penning back water to injury of plaintiff below so far as such detention is really prejudicial, but no further—General principles on which Equity exercises its power in such cases—Where from circumstances it appeared that penning back the water between 10 o'clock at night and six in the morning, would not really injure plaintiff, Court refused to restrain him between those hours,) 113

HEARD *v.* PHILLIPS,—

(Absent Debtor Act—a person in possession of choses in action of absent debtor, not chargeable as garnishee,) 155

HODGSON, E. J. *v.* THOMAS DAWSON,—

(Application for time to plead—on what terms order granted,) 191

HASZARD *v.* THE MUTUAL INSURANCE CO.,—

Pleading—duplicity—general allegation of fraud sufficient where alleged fraud lies in knowledge of opposite party—amendment after demurrer argued, when allowed,) 193

HODGSON, E. J. *v.* THOMAS DAWSON,—

(Judge at Chambers no power to order *viva voce* examination of a witness *de bene esse*,) 198

HODGSON *v.* DAWSON,—

(Judge—what interest disqualifies him from trying a cause,) 198

HALL & MARSHALL *v.* YATES,—

(Merchant Shipping Act—where fishing vessel is seized and condemned under 52 section of Merchant Shipping Act, seines and implements put on board for fishing purposes also forfeited,) 229

HALL & HEARD *v.* PRINCE EDWARD ISLAND MARINE INSURANCE COMPANY,—

(Insurance—Constructive total loss—cargo damaged, landed and sold, but no evidence given to show that it could not have been forwarded, or that if forwarded its value at the port of destination would not exceed the salvage and other expenses—held plaintiffs could not recover for a total loss,) 252

— —, *v.* IRVING,—

(Bankrupt—English protection, 23 Sec., 5 & 6 *Vic.* does not apply to Colonies—affidavit made in *England* must be authenticated by affidavit made in this Court,) 27

LEFURGY *v.* McGREGOR & McNEILL,—

(Contract construction of—distinction between liquidated and unliquidated damages,) 194

McDONALD v. LONGWORTH,—
(Absent Debtor—Debtor summoned under Trustee Process not liable to assignee of absent debtor without notice—reasonable time before Assignment—Assignment of chose in action to Trustee without assent of Creditors void against attaching Creditors,) 35

McKINNON v. McKINNON,—
Ejectment—Estoppel by acts and conduct,) 42

MITCHELL v. HARVIE,—
Lieut. Governor may pardon prisoner before or after trial, but cannot, without pardon, order him to be discharged before trial—In action for escape, plaintiff must prove some damage,) 45

McINNIS v. McCALLUM,—
(Illegitimate children—Action by mother of—The 15 *Vic.* c. 23, only applies to women who have a parent, guardian, or master, who might maintain the action,) 72

McKINNON v. McKINLEY,—
(Distress—Bailiff may use force necessary to ascertain if door is fastened,) 81

McLEAN v. WHELAN,—
(Challenge to array—Court will set aside special Jury panel for misconduct of officer returning it—certainty and conclusiveness of allegations necessary in affidavits to support application,) 97

McKEAN & SUTHERLAND v. McKENZIE,—
(Absent Debtor Act—A non-resident who comes for a temporary purpose to this Island, and while here conceals himself to avoid arrest at suit of a plaintiff resident in *Nova Scotia*—is an absconding debtor within 20 *Geo.* 3, cap. 9—and such plaintiff may proceed against him by attachment,) 145

McKAY, GEO. IN RE,—
(Held that an assignment to a creditor by an insolvent person after service of process under pressure did not deprive prisoner of right to weekly allowance under Insolvent Act,) 195

McPHERSON v. RAMSAY,—
(Description of Boundaries—words necessary to ascertain the premises cannot be rejected,) 205

McINTYRE v. McINTYRE,—
(Award—When award stated that both parties attended, and that arbitrators heard and considered allegations of both parties, Court will, on Demurrer, assume that facts justified award—if facts existed which would render award uncertain they should be pleaded,) 216

PIDWELL *v.* McDONALD,—
(Summary suit—Debt reduced by payment—Balance due if under £20 may be sued for on Summary side,) 33

PLEADWELL *v.* BRENAN,—
(Surveyor of City of Charlottetown has no power to remove an erection which he thinks encroaches on the Street, but which has not been used as a Street—City Bye Law giving him such power *ultra vires* and void,) 105

ROBINSON, APPLT. *v.* McQUAID & OTHERS,—
(Board of Education—order locating school-house under 15 *Vic*, Cap. 13, valid until quashed though house within three miles of another—Requisition must be in writing and addressed to Board established under the Act,) 74

REGINA *v.* COX,—
(Fishery reserves—construction of Township grants,) 122

REGINA *v.* WHELAN,—
(Libel—criminal information—where libel charges applicant for Rule with having by previous article provoked it—the charge must be answered by affidavit on which Rule moved,) 156

REGINA *v.* WHELAN,—
(Libel—criminal information—a party seeking a criminal information against another must himself be free from blame,) 158

REGINA *v.* THOMPSON & WALSH,—
(Jury *de mediatate linguae*—If right to ever existed in Prince Edward Island is abolished by Island Jury Act) 162

REDDIN *v.* JENKINS,—
(Registry Act—Judgments binding land—where L conveyed to I, and subsequently to the conveyance, but before its registry judgments were entered up against L—held such judgments did not bind the land conveyed,) 163

REGINA *v.* CHAS., WM. & ARTEMAS LORD,—
(Sea Shore—right of Public to have way over shore when tide out—right of riparian owner to make erections on shore—riparian owner has the right to seaweed deposited between high and low water mark,) 171

REGINA *v.* GORBET & ORS,—
(Criminal Law—Indictment quashed because agent of prosecutor on Grand Jury who found Bill,) 184

REGINA *v.* DOWEY,—
(Grand Jury—no objection to Grand Juror that he was foreman of Cororner's Jury which returned verdict of murder against prisoner) 207

REGINA *v.* SCHOONER "S. G. MARSHALL,"—

(Seizure for breach of Merchant Shipping Act, 1854, and of the 59 Geo. 3, cap. 38, for regulating the fisheries under the Convention of 1818—Condemnation for navigating under a register illegally issued, and flying a British flag, and falsely assuming the British National character,) 219

SULLIVAN *v.* RAMSAY,—

(Land Tax Act 11 *Vic.* c. 7. sec. 12—Supreme Court has large power in ordering redemption of lands sold under Act—Purchaser under Act stands in position of Mortgagee in possession and cannot clear land or commit waste &c,) 149

SULLIVAN *v.* RAMSAY,—

(Land Tax Act 11 *Vic.* c. 7, s. 12—If offer to redeem be made in two years from sale sufficient—Rule to redeem may be taken out after expiration of the two years—where there are no circumstances to excuse a tender, owner must make a legal tender in money—if dispute as to amount of redemption, either party may apply to Court,) 153

SULLIVAN *v.* CARR and H. & J. RAMSAY,—

(Land Tax Act—Redemption—where purchaser of land under Act transfers his right to another before time for redemption expired, tender to purchaser is sufficient—where purchaser must be aware that person tendering does so as agent of owner, sufficient though owner not expressly named by agent.) 160

SULLIVAN *v.* CARR and H. & J. RAMSAY,—

(Land Tax deed—Redemption—Attachment granted against defendants, purchasers, for not executing deed of reconveyance according to order of Court,) 169

SANDERSON, APPLT. *v.* HAYDEN, RESPDT.,—

(Appeal from Commissioners' Court—notice not entitled in any Court bad,) 196

SWABEY *v.* PALMER,—

(Trespass for shooting dog—master liable for acts of servant done in course of employment—if from facts master's concurrence can be presumed trespass lies—in absence of such presumption case against master proper remedy,) 202

STEWART, ALEXANDER, EX PARTE,—

(Absent debtor suit made a remanet at third term—same effect as if special leave to stand over were granted,) 242

THE UNION BANK *v.* THOMAS DAWSON,—

(Application for Commission to examine witness abroad—where circumstances suspicious, affidavits must state facts excusing delay in making application fully—and allegations must not be argumentative,) 196

TABLE OF CASES.

WHITE v. WHITE,—

(Father and Son—Where a son continues to work with father after 21 without agreement for wages—action will lie if circumstances show some remuneration was to be made though amount to be fixed by father,) 53

WEATHERBIE v. GREEN,—

(Foreign Bankruptcy—Action for debt contracted in New Brunswick barred by certificate of Bankruptcy obtained there.—Act of New Brunswick proved by a Barrister of that Province,) 68

WOOD v. GAY,—

Absent Debtor Act, 20 *Geo.* 3 c. 9—In suit commenced by attachment against absent debtor plaintiff must bring cause to trial at third term, or obtain leave to continue it—otherwise suit discontinued,) 143

WINSLOE, JOHN HODGES, in the matter of the petition of,—

(Partition of Lands under Acts 18 Vic. c. 18 and 27 Vic. c. 27,) 254

YOUNG v. YOUNG,—

(Witness remaining in Court after order to withdraw—It is in discretion of a Judge to allow him afterwards to be examined,) 69

Cases

ARGUED AND DETERMINED

IN THE

SUPREME COURT

AND

COURT OF CHANCERY

OF

PRINCE EDWARD ISLAND.

CORMACK v. WORREL.

Hilary Term, 1850.

Absent Debtor—Agent may defend first trial without waiving principal's right to rehearing.

This action was commenced under the 20 *Geo.* 8, Cap. 9, by attachment against the property of the defendant, late an inhabitant of this Island, without Summons on the agent. At the trial, the agent of the defendant, by his Counsel, wished to cross examine the witnesses and address the Jury. It was objected that he could not do so without waiving the defendant's right to a rehearing under the 8th section, and that as no appearance had been entered by the agent for the defendant, the agent could not be heard to defend. My opinion at the trial was, that the agent had a right to make the defence he desired, but as the point was new I refused to allow his Counsel to proceed and reserved the point.

The Statute gives extraordinary powers by allowing a suit to be tried and a person to be condemned in any amount without notice of the suit against him. Now, however necessary this departure from the ordinary rule (that no one shall have judgment against him without notice to answer the suit) may be, and it is, no doubt, very necessary, it is plain, that, unless it were coupled with provisions widely different from those which regulate the practice in ordinary suits it would render

the property and assets of absent persons insecure, and furnish the unscrupulous and dishonest with facilities for making the Courts of Justice instrumental in the commission of fraud. To guard against this the statute provides, "That a declaration shall be left at the defendant's last place of abode fourteen days before the sitting of the Court, and that his attorney, factor, agent, or trustee, shall, if he desire, be admitted to defend the suit on behalf of his principal throughout the course of the law,' 'and an imparlance shall be granted two terms successively that he may have an opportunity to notify his principal, and at the third term without special matter alleged in bar, abatement or continuance, the cause shall peremptorily come to trial. Now though a person may be the general agent of an absent debtor he may not be conversant with all, or any of the transactions out of which a suit may arise, and claims not founded in justice would be those with the circumstances of which he is least likely to be acquainted. Suppose an account rendered to the principal containing gross over charges had been settled by payment of a smaller sum, he would not suppose it would be again called in question, and would therefore not probably on his departure, inform his agent of the fact. If this account were sued for under the act, to make a *successful* defence, the agent would require instructions, but his principal may be in some distant country, or he may not know where he is, and cannot therefore obtain the information before the trial. Is the agent therefore to be silent and allow a verdict to be obtained for perhaps £200, when, if his counsel were allowed to cross examine, and the value of the articles in the account and other circumstances to be inquired into, he might at once, without any instructions from his principal, reduce it perhaps to £100, or if he ventures to do so must he deprive his principal of a rehearing under the 8th section, and thereby fix him with the £100, when in fact, nothing was due? Again the three years allowed by the 8th section may expire before the principal returns, or is heard from, or in fact before he knows that he is sued. And then if the agent, induced to silence through fear of waiving his principal's right to a rehearing, makes no defence, his principal is fixed with the £200, when even the half defence of his uninstructed agent would have reduced it to £100; I cannot think such a construction would be in accordance with the spirit and intention of the act.

The Act recognizes the necessity which may exist of the agent's communicating with his principal, and gives a very limited time for that purpose. It then speaks of a trial to be had in the defendant's absence, and on which trial the agent may or may not have received instructions from his principal. A trial necessarily supposes the probability of something more than a mere hearing on one side only, and the provision allowing the agent to defend the suit if he desire, and giving a certain time to communicate with his principal, and then ordering the trial peremptorily to take place at the third term, shews the Legislature to have contemplated the agent's taking part in it whether he received instructions or not, (if not, why in case of non-appearance did it not allow the plaintiff to take judgment by default? Why should it require the intervention of a Jury not to assess damages but to try the cause?) and then the 8th section (*without excepting cases* where the *agent* may have appeared at the first trial, or confining it to a mere *ex parte* trial) enacts, that the "absent person against whom judgment shall be recovered as aforesaid, shall be entitled to a rehearing within three years." These provisions appear to me irreconcilable with the idea that the agent must be a mere silent spectator at the first trial, or, if he attempts to cut down the plaintiff's demand concludes his principal by the result.

It was urged (on the principle "*qui facit per alium facit per se*") that the appearance of the agent cured the abscondency, but the fallacy of this argument lies in *assuming* that the appearance of the agent must be the appearance of the principal. To make the appearance his act, he must have authorized it to be entered. It by no means follows that the agent left in charge of property has authority to defend suits brought against the owner *for debts*, yet his duty would be to protect it, as far as he could, from attachments, or other claims, with the validity of which he is unacquainted; before therefore the maxim "*qui facit per alium facit per se*" would apply it must appear that he was authorized to defend *that particular* suit, and then, the appearance would, in fact, be the appearance of the principal and might deprive him of his right to a rehearing under the 8th section. But how can a person be *presumed* to have given authority to defend a particular suit, when, for anything that appears he may never have had notice of the plaintiff's intention to bring a suit against him? Besides the 2nd section in express words speaks of a judgment to be

recovered *in a trial to be defended by the agent*, and then the 8th section in equally express terms enacts that in the cases mentioned in the 2nd section in which judgment is recovered as therein mentioned, the defendant shall be entitled to a rehearing. A provision which is quite inconsistent with an intention to make the appearance of the agent tantamount to the appearance of the principal, or, in other words, cure the abscondency. The defence of the agent in cases of this kind is, in truth, his own act, to protect the assets committed to his care, and not the act of the absent party at all, and the novelty of allowing a person not a party on the Record to defend, is a necessary consequence of the novel manner in which the plaintiff is allowed to prosecute his suit.

It was insisted on by the plaintiff's Counsel that unless notice was given of the agent's intention to appear at the trial the plaintiff would be taken by surprise, but I cannot see the force of this argument. In every suit where the General issue only is pleaded the plaintiff might make the same objection. The only intimation the defendant gives of his ground of defence in those cases being, I don't owe anything, which is precisely what the defendant, (or rather the Court,) in an absent debtor case says for him. The General issue in those cases is in fact put on the record, and the Jury are sworn to try it, and any defence which the defendant himself could make under it, can I think be made by the agent unless (as in case of set off) the law requires a notice of it to be given to the plaintiff in which case the agent would have to give it in the same way as the defendant must have done.

An inference was attempted to be drawn by the Solicitor General from the 4th section to shew that the agent *must* come in at the first term, but that section applies to cases where the plaintiff *not only* asserts his claim against the absent debtor, but also puts himself as it were, in the shoes of the absent party, and attempts to call his agent to account for the assets of his principal in his hands. That is a very different case from the present. There, the agent himself may become the defendant and say I owe the absent party nothing, and an issue may thus be raised between the agent and the plaintiff entirely collateral to the principal's suit. Besides, the section applies only to costs, which appear to be given *in terrorem* against the garnishee if he does not appear at the first term, to prevent his delaying the discovery which the plaintiff seeks from him, and

which it may be material he should have in the first instance, in order that he may see whether the assets of the absent debtor will furnish the fruits of the judgment in the principal suit. A circumstance which may materially influence him in its further prosecution.

Upon the whole it appears to me that the plaintiff can sustain no injury from the agent's being allowed to contest the first trial, but that the greatest injustice may result from his being excluded, a circumstance which, if the intention of the Statute had been doubtful, (which I do not think it is) would have caused me to ponder well before arriving at a contrary conclusion.

The *American* cases which were cited at the bar were determined on acts having provisions different from our Statute and if it had been otherwise I should not consider myself bound by them in opposition to what I conceive to be the clear intention of the act.

The Rule for a New Trial must be absolute.

HOWAT v. LAIRD.

Easter Term, 1850.

Riparian owner of stream—Has right to the water in its natural course, without interruption in quantity, or retardation of flow—Action lies for injury to right, though no actual damage sustained.

This was an action for interrupting a natural water course. It appeared that the plaintiff's mill was erected in 1815, and that about ten years since the defendant had erected a mill higher up on the same stream. The evidence on both sides went to prove that at many seasons of the year the natural flow of the stream would not keep up a head of water sufficient to drive the mills, and that the defendant was in the daily habit of shutting the gates of his dam and stopping the water for considerable portions of time (chiefly during the night) whereby during those times it was prevented from flowing to the plaintiff's mill. The plaintiff contended that he had sustained actual damage by being prevented from grinding corn, which, but for such interruption of the water, he would have done (but on this point the evidence was contradictory,) and that even though he had suffered no pecuniary loss, yet, as he

had shewn a material and continued interruption of the natural flow of the stream, there was an injury to his right and therefore he was entitled to a verdict.

I told the Jury that the running water of a natural stream was public property, and that no one had a right to interrupt or detain it, that though slight or temporary detentions might not be actionable unless actual damage were sustained, yet, that substantial and continuous interruptions of the natural flow of the stream were so whether actual damage were sustained by those below or not, because if they were suffered, at the end of twenty years the party making them would acquire a right to continue them, and that, in the present case, if they found that defendant had been in the habit of detaining the water, either by night, or day, for considerable portions of time, whereby its flow to the plaintiff's mill was interrupted, the plaintiff would be entitled to recover nominal damages for the injury to his right, and that if under the evidence they thought the plaintiff had sustained actual loss in consequence of such detention, they should give such amount as would compensate the loss.

The Jury found for the plaintiff damages one shilling. The effect of this verdict is, that the Jury find that the defendant has caused substantial interruption of the *natural* flow of the water, but that the plaintiff has sustained no *actual* loss thereby.

A New Trial is now moved for, for misdirection, and the grounds relied on by the defendant's counsel are.

First, that every Riparian owner has a right to erect a dam, and daily to detain the water, for such spaces of time as may be necessary to fill a dam of such size as is reasonably sufficient to drive his mill.

Secondly, that this is at most a mere injury to a right without any actual damage for which no action lies.

In support of the first proposition, the learned Counsel for the defendant relies on the doctrine laid down by Chancellor *Kent* 3 Com. 439, who says "That streams of water are intended for the use and comfort of man, and it would be unreasonable, and contrary to the evident sense of mankind to debar every riparian proprietor from the application of the water to domestic, agricultural and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned, and there will, no doubt, inevitably be in the exercise of a perfect right to the use of water, some evapora-

tion and decrease of it, and some variations in the weight and velocity of the current, but "*de minimis non curat lex*," and a right of action by a proprietor below, would *not necessarily flow from* such consequences, but would depend on the nature and extent of the complaint and the manner of using the water. All the law requires of a party by or over whose land a stream passes, is that he should use the water in a reasonable manner, and so as not to destroy, render useless, or materially *diminish* or *affect the application* of the water by the proprietors below, on the stream."

But this passage when rightly considered is not an authority for the position relied on for the defence. No doubt as incident to the useful application of water power there must be slight variations in the force, and temporary detentions of the stream. It may be necessary to shut the gates for short periods of time, not for the purpose of checking the stream to raise a head, but to carry on the ordinary work of a mill. Short interruptions of this description producing very slight injury to those below may rightly be said to come within the maxim "*de minimis non curat lex*." Again, there may be interruptions which will be actionable or not according as they are productive of actual damage or not. Every man has a right to erect a dam across a stream running through his own land, and he must necessarily (even on streams sufficiently powerful for his works) before he can start them, check the water to raise a head, but though he has a right to do this, he must do it so as to cause no serious loss to those below. For instance, suppose a person erect a dam which would flood some miles of ground and therefore require many days to fill it, and that during that time he constantly stops the stream, if the mill owner lower down could shew that he had been prevented from grinding corn, or had suffered material loss in consequence of such detention of the water, he would be entitled to recover, but unless he did he would not, *because* the act complained of would be done by the defendant not under a *claim of right* to cause daily and *frequent* interruptions, but only of a temporary kind equally necessary to all mills, (however well adapted to the force of the stream) before starting. So a dam may break and the water be let off to repair it, the letting of the water would cause a *temporary* increase of current, and when repaired another detention would be necessary to refill it, but if the increased velocity or temporary detention

caused no *actual* injury to those below, it would not be actionable because they would sustain no damage in fact, nor, (as the character of the act would not be such as to gain a right frequently to accelerate, or constantly to interrupt the stream) could there be any damage to the *right.*

This distinction as to the purpose with which an act is done was recognized in *Greensdale v. Halladay* 6 Bing 381. There the defendant had been in the habit of placing a board or fender across a stream to turn the water, but it had not been permanently fixed; the plaintiff's tenant fastened the board with stakes. The defendant conceiving that the stakes gave a character of permanency to the board, removed both *board* and stakes, and although plaintiff recovered on the ground that the defendant had no right to remove the boards, yet, the opinion of the Court seems to have been that if he had removed the stakes only he would have been justified. So in *Greaves v. Burbury coram* Bailey at York assizes "the plaintiff had used the water for his cattle and the defendant averted it under an *assertion of right* and of his *intention* that the diversion should be permanent. It was held that the plaintiff was entitled to recover damages, although the stoppage was, in fact, but temporary, for if no action was brought a stoppage with an assertion of right would afterwards be evidence of right.

It is to temporary interruptions of such description which do not, and cannot, materially,diminish or affect the application of the water by the proprietors below to the various purposes to which it may be applied, that I understand Chancellor *Kent* to refer.

But the question assumes a very different aspect when the defendant claims a right daily to cause an almost total stoppage of the stream for considerable portions of time in order that he may raise a head of water necessary to drive his works. This appears to me an interference with the rights of those below not consistent with the principles laid down in some (even of the *American*) cases, which seem to be considered of the highest authority in that country.

In *Tyler v. Wilkinson* 4 Mason Rep. 401, justice *Story* says, "I do not mean to be understood as holding the doctrine that there can be no *detention* whatever, or no obstruction or impediment whatever, by a Riparian proprietor in the use of the water as it flows, for that would be to deny all valuable use.

The *true test* of the principle and extent of the use is, whether it is to the *injury of the other proprietors or not.* There may be a diminution in quantity, or a retardation or acceleration of the natural current indispensable for the general use of the water, perfectly consistent with the use of the *common right.* The diminution, retardation, or acceleration, not permanently and sensibly injurious by diminishing the value of the common right, is an implied element in the right of using the stream at all.

In *Seckinder v. Beers*, 10 Johns., Rep. 241, the court says, "The defendant has no doubt a right to build a mill on his own land, but he must so construct the dam, and so use the water as not to injure his neighbors below in the enjoyment of the same right *according to its natural course.*" The principle of the *American* Law appears from these cases to be, that, although the owner above may cause slight interruptions, accelerations and detentions, yet, if they be such as sensibly to diminish *any one* of the advantages which it would naturally afford the owner below, it will be an injury to the right. There are many *American* cases which go much further, some not reconcileable with each other, and some permitting interruptions which might destroy the use of streams for manufacturing purposes altogether. Thus, in *Perkins v. Dowe* decided in *Connecticut*, it appears to have been held that a Riparian proprietor may use the whole of the stream to irrigate his meadows, provided he leave sufficient to the proprietor below for kitchen purposes, and for watering his cattle. But if this be law in that country, it is a doctrine unknown to the law of *England* by which, in this respect, we are bound.

A feeble stream may be quite sufficient to drive a small mill without material detention of the water, but if a person chooses, on such a stream, to erect a mill, which, at many seasons of the year, he cannot work without stopping the water for considerable portions of each day, such stoppage must be a *permanent* and sensible injury to the right of those below, because, even if they have mills of the same description, (viz: requiring more power than the stream would constantly afford), it would restrict their working in a great measure to such times as the miller higher up chose to let off the water. But there are other works to which those below may apply the water. The carding mill, the trip hammer of the engineer, the turning lathe of the mechanic, the loom of the weaver, the threshing machine and chaff-cutter of the

agriculturist, and various other kinds of machinery, just as important to their respective owners as the saw, or grist mill to theirs, might (when a head of water was once raised) be at all times driven by a stream quite insufficient to keep a saw or grist mill constantly at work. The owners of such works would have a right to keep them at work during the whole twenty-four hours. Can the owner of works higher up, by the Common Law of *England*, require that right to be sacrificed, or abridged for his benefit? If he can, then those lower down must be constantly subject to have the *value* of their property materially diminished, since the *value* of their participation in the common right, would then depend, not on the natural force of the stream, but on the power which the upper works from their construction may require from it. That the value of the water privilege does not, by the Law of *England*, rest on such uncertain and fluctuating grounds, appears plain from some decided cases.

In *Shears v. Wood* 7 Moore 534, it appeared that the plaintiff's were owners of Copper Mills, and the defendant, of a Silk Mill higher up on the same stream, that the latter caused a dam to be erected which prevented the water from being supplied to the lower mills, but that the stream was not diverted in consequence, as the water returned to its regular course long before it reached the lower mills, and that no waste of it whatever was occasioned by the dam in question. It was proved that the plaintiff had sustained an injury by the erection of the dam, as, in the manufacture of copper, a regular supply of water was always necessary. It was objected by the defendant that the injury done to the plaintiffs, by the erection of the dam, was misdescribed in the declaration, as the regular supply of water was not diverted, but interrupted. The Court over ruled the objection, saying, "that it was in fact stated in the declaration that the water did not run to the plaintiffs' mills as they were accustomed to have it. That is sufficient to show that it did not come to them in its proper and its usual times, or as it ought to have done, and it was proved that it did not come to their mills in a sufficient quantity as it formerly used to do; that fact was sufficient to support the declaration."

In *Howard v. Wright* 1 Sim. & Stat. 190, the Master of the Rolls says, "The right to the use of water rests on clear and settled principles; every proprietor has an equal right to

use the water which flows in the stream, and, consequently, no proprietor can have the right to use the water to the prejudice of any other proprietor who may be affected by his operations. No proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back on the proprietors above. Every proprietor who claims a right either to throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years," and he adds, "an action will lie at any time within twenty years, when injury happens to arise, in consequence of a new purpose of the party to avail himself of his common right."

In *Brady v. Shaw*, 6 East 214, Lord *Ellenborough* says, "the Rule of law, as applied to this subject, is, that independent of any particular enjoyment used to be had by another, every man has a right to have the advantage of a flow of water in his own land without diminution or *alteration*.

In *Mason v. Hill*, 3 Barn. and Adol. 304, where it was contended that prior occupancy by the defendant, (which here is in fact with the plaintiff,) gave the defendant a right which it was admitted he would not otherwise possess. Lord *Tenterden* decides the case on the authority of *Howard v. Wright*.

And in the same case 5 Barn. and Adol. 18, Lord *Denman*, after an elaborate review of the authorities (and particularly referring to the rule laid down by Lord *Ellenborough* in *Brady v. Shaw*, "that every riparian owner has a right to have the water flow in his own land without *diminution* or *alteration*") says, "none of these *dicta*, when properly understood with reference to the cases in which they were cited, and the original authority in the *Roman* law, from which the principle, that flowing water is public property, is deduced, ought to be considered as authorities that the first occupier, or first person who chooses to appropriate a natural stream to a useful purpose has a title against the owner of land below, and may deprive him of the benefit of the natural flow of the water.

But the case having the most direct bearing on the precise questions before the Court is a very recent one, not referred to on the argument *Wood v. Wand*, 13 Jur. 472. There a special verdict, amongst other facts, found that the defendant

caused a diminution of the water of only 5 per cent. Chief Baron *Pollock*, in delivering the judgment of the Court, expresses himself as follows: "The defendants contend that the diminution of the water by 5 *per cent.* and the altering the flow of the water, are injuries too trifling to be the subject of an action." In considering this question, it is assumed that the plaintiff's right is established to the use of this water. It is said the true rule on this subject is laid down in 3 *Kent's* Com. 439, 440, and after quoting the passage (to which I have already referred) says, "In *America* a very liberal use of water for the purpose in question and for carrying on manufactures has been allowed. In *France* also the right of the riparian proprietor to the use of the water is not strictly construed. He may use it *En fou pere de famille en fou plus grand advantages.* He may make trenches to conduct the water to irrigate his land, if he return it with no other loss than that which irrigation causes. In *England* it is not very clear that such a user would be permitted as arising out of the right to use the water *jure naturæ*, but, no doubt, if the stream were only used by the riparian proprietor and his family, by drinking it and for the supply of domestic purposes, no action would lie for this ordinary use of it, and it may be conceived that if a field be covered with houses, the ordinary use by the inhabitants might sensibly diminish the stream, yet no action would, we apprehend, lie any more than if the air was rendered less pure and healthy by the increase of inhabitants in the neighborhood, and by the smoke issuing from the chimneys of an increased number of houses." But on the other hand, as the establishment of a manufactory rendering the air sensibly impure by emitting noxious gases would be actionable, so would it be if it rendered the water less pure by the admixture of noxious substances. *And if a mode of enjoyment quite different from the ordinary one is adopted, by which the water is diverted into a common reservoir, and there delayed for the purpose of a manufacture*, an action seems to us to be maintainable, and so, if by that mode of dealing with the water, it is sensibly diminished in quantity."

From these authorities it seems clear that any frequently recurring detention of the water of a stream by those above, which causes a sensible alteration in its natural flow, is considered in law an injury to the *right* of those below. The defendant here having caused such a detention, not for a

temporary purpose, but under a claim of right constantly to do so, has, I think, injured the plaintiff's right.

But then it is urged in the second place, that as the plaintiff has not shewn actual damage it is "*injuria sine damno*," for which it is urged no action lies. And for this the case of *Williams v. Morland*, 2 B. & C. 910, is relied on. In that case the plaintiff complained, that the defendant, by certain erections across a stream caused the water to flow with increased velocity, and thereby injured his bank. The Jury found *that it had not injured his bank*, and therefore the Court held he could not recover, and Lord *Denman* in *Mason v Hill* after explaining the observations of Bayley Justice states it to be a decision on this ground and nothing more.

In actions for obstructing ways, and surcharging commons, it is sufficient to prove that the means of using the right are abridged, without shewing actual damage, and I can see no reason why a different rule should prevail in cases of this description. A person may have a valuable mill privilege on his property, but want of capital, or other circumstances may prevent his turning it immediately to profitable use. If he cannot bring an action for interruption of the water before he has done so, then he must either make a considerable outlay merely to place him in a position to protect his right, or else he must, after twenty years, lose it altogether. This point was alluded to by Lord *Tenterden* in *Mason v. Hill*. After observing that it seemed to have been considered that an action would not lie without actual loss, he says, "It is not necessary to say whether such a principle should be admitted." The same point (though not necessary to be decided) was subsequently considered by the Court in the same case, and Lord *Denman* after referring to the cases of *Palmer v Keblethwaite* Show. 64, and *Glynne v. Nicholas*, 2 Show. 507, says, "It must not therefore be considered as clear that an occupier of land may recover for the loss of the general benefit of the water without a special use, or special damage shewn.

In *Gardiner v. Trustees of Newburgh*, 2 Johns Ch. Rep. 162, Chancellor *Kent*, in granting an injunction against diverting a water course, says, "It must be painful to any one to be deprived at once of the enjoyment of a stream which he has been accustomed to see flow by the door of his dwelling." Upon which Mr. *Angell*, in his treatise observes, that "it is fairly to be inferred from his opinion in this case, that he

considered the right to the water in its natural state to be a freehold right that could not be invaded whether the water were actually used by the party or not. And the same author after reviewing the *American* and *English* authorities on the infringement of rights of ways, commons, &c, concludes thus: "The rule established by these cases is unquestionably applicable to this subject, and they certainly evince that the owners of the land through which a stream of water passes in its natural course, are under no obligation to prove a specific injury for a diminution or detention of the water. That there exists a *right*, and that such *right* has been invaded, is sufficient, and if an action should be delayed until actual damage could be proved, the defendant by repeated invasions might himself acquire a title which could not be successfully opposed.

But the point was expressly decided in *Wood v. Wand.* There the special verdict found the grievance complained of viz., fouling the water caused *no actual damage* to the plaintiff. *Pollock*, ch. Baron, in delivering the Judgment, says, "The fact as found by the Jury is that the defendant (whose works have been erected within twenty years and who has no right by long enjoyment or grant to do so) has fouled the water of the natural stream by pouring in soap-suds, wool combings, &c., but that pollution of the natural stream has done *no actual damage to the plaintiff*, because it was already so polluted by similar acts of mill owners above the defendant's mill, and by Dyers still further up the stream, and some sewer of the town of *Bradford*, that the wrongful act of the defendants made no practical difference; that is, that the pollution by the defendants did not make it less applicable to useful purposes, than such water was before. We think, notwithstanding, that the plaintiffs have received damage *in point of law.* They had a right to the natural stream flowing through the land, in its natural state, as an incident to the right to the land on which the water course flowed, as will be hereafter more fully stated; and that right continues, except so far as it may be derogated from by user or by grant to the neighboring land owners."

"This is a case therefore of an injury to a right. The defendants, by continuing the practice for twenty years, might establish the right to the easement of discharging into the stream the foul water from their works; and if the dye works and other manufactories, and other sources of pollution above

the plaintiffs, should be afterwards discontinued, the plaintiff who would otherwise have had in that case pure water, would be compelled to submit to this nuisance, which would *then do serious damages to them.* We think the verdict must therefore be entered in this Court for the plaintiff."

From these authorities, as well as on the principle that if the law recognizes a valuable right, the owner of it should have the power of preserving it until he may want to use it, it appears to me clear, that for any material diversion, stoppage, or alteration of a stream, of a description injurious to the rights of those below, an action will lie, though no actual damage may have been sustained.

The question raised in this case, bearing as they do on valuable interests, rendered it one of considerable importance, and I have therefore thought it proper to enter at a greater length than I otherwise would have done, into the examination of the authorities and principles by which rights of this description are governed.

The rule for a New Trial must be discharged.

HOWAT *v.* LAIRD.

IN CHANCERY.

February 1851.

Injunction—Running Water—Mere recovery at Law for injury to right of riparian owner does not *per se*, entitle him to injunction, but equity will restrain if injury substantial or recurring.

In this case an injunction has been granted *ex parte*, restraining the defendant from penning back and interrupting the stream of a natural watercourse. The plaintiff is the owner of certain mills on the lower part of the stream, and the defendants are owners of certain other mills higher up. The Bill states that in consequence of the water being penned back by the defendant for the use of the upper mill, its regular flow to his mill was interrupted, for which he brought an action in the Supreme Court against the defendant *George Laird* and one *Benjamin Crew*, and recovered a verdict for nominal damages of one shilling, on which verdict, after argu-

ment, the Supreme Court gave judgment on the ground that though no actual damage was found, it was an injury to his right. The Bill further states that since such judgment the defendants have, at different times, penned back the water so as to impede the working of his mill, thereby causing him serious damage to his business. A motion is now made to dissolve the injunction, and numerous and lengthy affidavits have been produced on both sides.

I have attentively read the bill and affidavits, and paid great attention to the arguments on both sides, and I cannot come to the conclusion that the plaintiff has sustained any considerable damage from the acts of the defendants. The Bill certainly states that the plaintiff's mills have been stopped on several occasions for want of water, and the affidavit of *Joseph McDonald* states two occasions in July and August last, when there was a deficiency of water which he found to be caused by detention at the defendants' mills. But though on a few specific occasions some actual inconvenince may have been felt, the affidavits of the defendant and the whole circumstances of the case show that no such loss has been, or is likely to be sustained as would call for the continuance of the injunction on the ground of irreparable injury to the property or business of the plaintiff. I do not give much weight to the affidavits of the various persons who have deposed on behalf of the defendants, unless when they are supported by the probabilities of the case, because those affidavits are very largely composed of mere opinions and belief, and I must observe that in cases of this kind, where a great deal of feeling evidently exists, such affidavits should be cautiously received, as men are very apt to believe what they wish, and opinions may be composed of very elastic materials. The probabilities and features of the case, coupled with certain facts positively stated weigh far more with me.

I find from the affidavits that the defendants' mills are now driven with less water than formerly, and that if such be the fact, the water must be penned back by the defendants at their mills during the night; then, as all the water so collected must come down during the day, I cannot see how it can injure the plaintiff in respect of his present works. I can easily understand that if the flow of the stream was interrupted during the day, just when the defendants choose, or if the plaintiff, instead of his present works, had some small

machinery requiring a very small but constant supply of water, that the interruption in the first case, or an interruption or increased quantity of water, let off in the second, might be very injurious to him; but I cannot see how under these circumstances, it can be seriously injurious to the plaintiffs' present mills. This, to be sure, is only my opinion, and being the opinion of a person uninformed in such matters, is not of much value. But the plaintiff should offer the evidence of persons acquainted with such matters if he expects an uninformed person to entertain a different opinion.

Then, again, I do not find the plaintiff supporting his case by the description of evidence I should expect in such a case. The evidence of persons in his employ is, no doubt, good, and for some purposes the very best that could be offered, as when they depose to some fact peculiarly within their own knowledge, as the depth of the water they measured in the dam for instance, or that on such an occasion when they wanted water they found the defendants holding it back; but when a man complains that grist has been turned from his mill in consequence of another detaining the water, the kind of evidence which would then be best would be that of persons who had been in the habit of grinding their corn with him, but who could state that the water being now less regularly supplied, they were longer detained, or that from the uncertainty of his having water they had ceased going to his mill. It is said the persons in the vicinity of the defendants' mill have combined against the plaintiff in favor of the defendants, but there must be many persons near the plaintiff's mills whose convenience and interest would lead them to support his right, rather than the defendants' wrong, and the want of their testimony must, in considering the question, weigh against him.

Then, again, I find that the defendants' mill was erected in 1838 and though it is said it worked less regularly, yet it worked and with more water than it uses now, and yet until 1848 or 1849, he does not appear to have complained of its injuring him. On the contrary, about 1844 he tells *Clarke* and *David Lowther* that instead of being an injury, it had proved a benefit to him. I by no means agree with the defendents' counsel as to the effect of this expression. I merely look on it as the bantering of one rival miller respecting his opponent's mill. I do not think it a license or such an acquiescence, as under any circumstances, would amount in

law to a surrender of his right to the uninterrupted flow of the stream, But I do think if the detention of the water had been seriously injurious to him he would not have used it. All these circumstances lead my mind to the conclusion that no such irreparable injury has been sustained as would warrant the continuance of the injunction on that ground—a conclusion in which I am much strengthened by the fact stated in the affidavit and admitted in the argument that on the trial at law on very similar evidence, the Jury found no special damage but merely a frequent penning back, or interruption of the stream by the defendants.

On the other hand, the affidavits and arguments at the bar satisfy me that the defendants have since the trial been in the habit of frequently interrupting the natural flow of the stream, and penning back the water for the use of their mill, perhaps more cautiously, but in very much the same manner as they were accustomed to do before the trial. It is distinctly stated in the Bill and sworn to by the plaintiff, that after the trial, the defendants at different times penned back the water for the use of their mill and thereby interrupted its natural flow. The fact was a most material one, and if untrue should have been directly denied by the defendants, but they have not done so. *George Laird*, in his affidavit says, that since the Judgment of the Supreme Court, this deponent's sole object hath been to conform to the said judgment as near as *justice and equity* would allow in the use of the said stream of water, and that he has not nor hath any person on his behalf *materially* diverted, stopped, or altered the said stream; that the water gates are open *on all nights*, and that the working of the said mill during each day, as he does, naturally keeps the said water from being penned back, or interrupted. Now this is no denial of the alleged fact; it amounts merely to this, that in the defendants' opinion, he has not *materially* interrupted the stream, but the *materiality* of the interruption is a question of law which it was not for him but for the Court to decide. He states again that the waste gates are open *on* all nights, but this is not saying they were open *during* all nights. It might be quite true that they were open *on* all nights and yet, that during a considerable portion of every one of those nights they were shut. The affidavit seems drawn, principally, with a view of contradicting the damage in his business of which the plaintiff complains, and for that purpose, in connexion

with other facts, is sufficiently pointed in its allegations, but it seems cautiously to avoid an *admission* of actual stoppage, though, apparently, unable to deny it. And, indeed, such denial would be inconsistent with the whole argument for the defendants, in which it is constantly averred that their mills will be rendered useless unless allowed to pen back the stream for such a time as will raise a head of water to work them. It is stated by Mr. *Palmer* that an interruption of an hour and a half or two hours in each twenty four hours is sufficient to raise such a head. But if any argument was to be raised on the precise periods of time the defendants required to interrupt the flow of the stream to raise a head, it should have been distinctly stated in their affidavit, and not left to inference on the mere assertion of counsel.

To meet this, the plaintiff, in his affidavit, swears positively, that from the weakness of the stream it requires 16 hours in ordinary seasons to collect water enough to drive his mill 8 hours, and that from this he knows it to be impossible for the defendants to work their mill with effect one hour, if the natural flow of the stream was allowed to pass the previous night. And again he swears positively that on two different occasions in September last, when he passed near the defendants' mills, he each time particularly observed the water "wholly penned back by the defendants' dam, none being allowed to escape through the flume or waste gate, or by any other means.

Joseph McDonald also, who has worked the plaintiff's mill, swears that if the water were allowed to flow all night without interruption, the defendants' mill, in ordinary seasons, would not have sufficient water to grind one hour with effect, and (as I before shewed) he states two occasions on which he found them holding back the water. It is true the defendants' mill may work with far less water than the plaintiff's, but I can hardly imagine that there can be such a difference between them that when 16 hours are required to collect water to drive the plaintiff's mill 8 hours, 2 hours will collect sufficient to drive the defendants' mill all day. At all events the defendants were best able to tell the precise time they required to stop the stream during each 24 hours, and as they have not done so, I am bound, under the affidavits, to believe that to work their mill so constantly as they state, they are in the habit of interrupting the natural flow of the stream for much longer periods of time, although, as I have already said, not in

such a manner as to have caused any serious loss to the plaintiff in his business.

Upon this state of facts the case turns principally on two questions.

First, whether the owner of land through which a natural water course flows can daily interrupt the natural flow of the stream, and detain the water for such spaces of time as may be necessary to drive his mill without subjecting himself to an action by the riparian owner lower down for an injury *to his right*, although such interruption and detention cause no actual damage to the lower owner in respect of the purposes to which as yet he has applied the water?

Secondly, if he can, whether after the owner lower down has established his right in a court of Law, this court (*where no actual damage* is, or will likely be sustained) should interfere to restrain the upper owner from continuing such interruption and detention of the water?

But before considering these questions, it is well to advert to some minor points made during the argument. It appears that the plaintiff's saw mill (in the same dam as his grist mill) was originally leased by the proprietor to a third person, and that up to the time of the defendants purchasing it, the water in the dam was divided between the saw and grist mill. By the affidavit of *Donald Palmer* it appears that about 1841, he, *Donald Palmer*, and his brother became the owners of the upper mill by assignment from *Daniel Crew*, the original lessee, that whilst he and his brother continued so possessed of the upper mill, about the year 1842, they purchased the saw mill from the tenant, and, on the expiration of the term, they obtained a new lease of the saw mill from *Col. Fane*, the landlord of both upper and lower mills. That whilst the deponent and his brother so held the saw mill and the upper mill they used the water of the stream for the benefit of both mills, in the language of the affidavit, "the one subject to the use of the same stream for the other, each fairly participating in the benefit and use thereof." That the plaintiff afterwards purchased the saw mill from the deponent and his brother, which, the deponent says, "he considered he took subject to the same rights and restrictions as he and his brother held and enjoyed the same under." On this it was argued for the defendants, that there having been a unity of possession in *Donald Palmer* and his brother, in the saw mill and the

upper mill, the original right of the saw mill to the natural flow of the water was extinguished and must be held subject to the right of the upper mill, and the plaintiff claiming through *Donald Palmer* and his brother was, therefore, bound by the right so supposed to be obtained for the upper mill.

To decide this point it is not necessary to follow all the arguments gone into at the bar. It is sufficiently clear that the plaintiff, even when *Donald Palmer* and his brother held the saw mill, had a right to one half the *momentum* of the stream for his own benefit, and no user of the water for the benefit of the upper mill, however expressly or impliedly then made by *Donald Palmer* and his brother, to abridge the privilege of the saw mill, could control or effect the plaintiff's share of the water power, unless (which is not the case) a 20 years' acquiescence, on his part, appeared. Besides, it is expressly laid down in *Angell*, on Water courses 58, that the right to the natural water course is not extinguished by unity of possession in any case, and the same point was decided in *Wood v. Wand*, 18 Jur.

It was contended, at the bar, that an injunction could not be granted until after a trial at law, *directed by the Court*, had established the plaintiff's right, and that the trial which has been had in this case, is not sufficient for that purpose. All that the law requires is that the legal right of the plaintiff in the matter in dispute should have been ascertained. Whether it be ascertained by an action brought before the suit in this court is commenced or by an action brought afterwards by direction of this court can make no difference. In *Hanson v Gardiner* 7 Ves. 311 Lord *Eldon* says "I think myself authorized to take what passed at law as if an action had been directed by the court. And in *Thomas v Jones* Y & C 510, where the plaintiff's right was established in an action at law, brought by the plaintiff and not in an issue directed by the court, a perpetual injunction was granted.

It remains to consider the two important questions above mentioned.

The first, viz., whether the riparian owner can daily interrupt and detain the water for the use of his mill without being liable to an action by the owner lower down has been already fully considered in the Judgment of the Supreme Court in the action at law between these parties, and as I see no cause for changing the opinions I then entertained, it is

unnecessary again to enter into the reasons which were then fully stated. The case of *Wood v Waud* 13 Jur is however so applicable to this point that I will briefly state the points there decided. In that case, (like the present) the defendants were owners of mills higher up and the plaintiff of mills lower down on the same stream. The plaintiff complained *first*, that defendants fouled the water. The special verdict found it was so dirty before, that the dirt thrown in by the defendants caused no actual injury to the plaintiffs. The Court held notwithstanding that, as by continuing to do so for twenty years the defendants would gain a right to foul the water, the plaintiff was entitled to recover.

Secondly, the plaintiff complained that the defendants had wasted the water. The special verdict found that the water was used by the defendant's steam mill. That about 5 per cent of the water was lost by evaporation in passing through, the boilers, and that subject to that *unavoidable* loss, the whole of the water reached the plaintiff's mills. The Court held he was entitled to the *whole* of the water, and therefore to recover for this also.

Thirdly, the plaintiff complained as he does here, that the defendant had stopped and hindered the water from running and flowing in its usual course to his mill. The special verdict found that the defendants *detained* the water in a reservoir for the use of their mill, and that after using it, the whole, as it does in this case, reached the plaintiff's mills. The Court after referring to the doctrine of Chancellor *Kent*, (which was here relied on for the defendants) say that if the water is diverted into a reservoir and there delayed, an action seems maintainable, and the plaintiff had judgment for that detention also. I cannot see any distinction between that case and the present and it seems to me decisive on this point.

The last question is, whether this is a proper case for the preventive interference of this Court?

For the plaintiff it is insisted that his legal right having been established this Court can look at nothing else, but is bound to protect it. For the defendants, it was strongly urged that there was here no destruction or irreparable injury and, therefore, the Court could not interfere and *Hanson v. Gardiner* 15 Jur. 136, *Coward v. Tickler* 19 Ves. 6I9, and the *Attorney General v. Hallet* 16 M. & W. 568 and other cases were cited in support of the last proposition, but those were

cases where the injunction was applied for, or had been granted, before the right had been established at law. Where destruction or irreparable injury is threatened, and the legal right is doubtful, Courts of Equity interfere by injunction to preserve and keep things as they are until the legal right is ascertained by a trial at Law. Thus in the *Atty. Genl. v. Hallet* the Court refused the injunction *on the ground* that the injury complained of was *not irreparable in its nature*, but Baron *Alderson* expressly says that if the right should be established at law the plaintiffs would be *entitled* to an injunction. But when (as in this case) the right has been established at Law, there the jurisdiction is much wider. Then, when destruction or irreparable injury is threatened, or when the injury complained of cannot be adequately compensated by damages at law—as loss of trade for instance—or where it is such as from its continuance must occasion a constantly recurring grievance, and will, therefore, require a multiplicity of suits for its redress, Courts of Equity interfere by injunction to prevent it.

In this case no destruction or irreparable injury is threatened. Serious injury to the plaintiff in his business is negatived by the case made for the defendants. But from the nature of the injury the grievance will be constantly recurring, and the question is, whether, as the loss it occasions the plaintiff, is nominal and not actual, it amounts to that kind of injury which (though constantly recurring) a Court of Equity should interfere to prevent?

Both Mr. *Daniels* and Judge *Story*, in speaking of injunctions against private nuisances, say the interposition in these cases is founded on the general restraining of irreparable mischief, or of preventing multiplicity of suits, but that it is not every case which will furnish a right of action, which will *justify* the interposition of a Court of Equity to redress the injury or *remove the annoyance*. There must be such an injury as from its nature is not susceptible of being adequately compensated by damage at law, or as from its continuance or permanent mischief must occasion a constantly recurring grievance. For which they both cite *Coulson* v. *White* 3 Aitk. 21, which merely says "that if a trespass is so long continued as to become a nuisance the Court will grant an injunction to restrain the party from committing it." In this case (which is very shortly reported) it is likely that the act

producing actual injury (as in the *Atty. General* v *Hallet*) was done on the plaintiff's land The other cases cited by these authors is the *Atty. General v Nichol*, 16 Ves. 342. In that case an injunction had been granted against obstructing ancient lights. Lord *Eldon* says "cases may exist upon which this Court could not interfere, yet an action on the case might be very well maintained. And he dissolved the injunction upon the defendants' undertaking, if the verdict should be against him, to remove such building "as should be proved to affect the ancient lights in a *material and improper degree.*" Both the expressions of Lord *Eldon* and the terms of the undertaking he imposed on the defendants ; to remove what affected the lights in a "*material and improper degree*," shew that he considered it quite possible that the plaintiff might obtain a verdict for such an obstruction as might amount to a nuisance at law, without being so hurtful to him as to entitle him to an injunction absolutely restraining the infringment of the legal right.

In *Winstanley* v. *Lee* 2 Swainston 333, the Master of the Rolls, in a case for obstructing ancient lights, says, " It may be perfectly clear that the plaintiff is entitled to succeed in an action, and yet a Court of Equity will not interfere by injunction. The plaintiff is bound to shew not only a legal right to the enjoyment of the ancient right, but that if the building of the defendants is suffered to proceed such an injury will ensue as warrants the Court to interfere.

The doctrine laid down by the Vice Chancellor in the *Atty. General* v. the *Eastern Railway Company*, 7 Jur. 806 bears closely on the point under consideration. In that case the defendants had committed an infringment of a strict legal right,to restrain which an injunction had been granted *ex parte*. In giving Judgment, he says, "I cannot however, see that any practical injury has been done, and considering all the circumstances of the particular dispute before me, I am of opinion that it is not a *necessary duty* of the Court to interfere by injunction. In all cases it is subject to the judicial discretion of the Court according to the circumstances. The infringement of a strict legal right goes a *great*, but not always the *whole way*, to induce the Court to continue an injunction, and the Court will endeavor to do *substantial* justice between the parties." And he suspended the injunction on the defendants undertaking to keep the way open in such a manner as would

produce no *real* inconvenience to the plaintiff without entirely restraining the works of the defendants.

Some cases from *Angell* on Water courses were relied on for the plaintiff, but in all of them the diversion of the stream seems to have caused, or been likely to cause actual injury to the plaintiff. In *Thomas v. Oakley* 18 Ves. 185, the stone from the quarry which was taken was parcel of the inheritance, and, therefore, actually injurious.

The law as laid down in *Webb v. The Portland manufacturing company*, reported in the Appendix to *Angell*, is certainly very strong against the defendants in this case. It was a case on a Bill for an injunction very similar to the present, in some circumstances. But though stated in the case that the diversion caused no actual damage to the plaintiff's mills, yet, as the Judge observed, it was hardly possible that there would not be actual damage to the plaintiff, as the diversion of the water must diminish the value of his mill privilege. And it seems to me this must have been the ground on which the injunction, in that case, was granted. If the doctrine laid down is understood as going to the extent that in every case where the verdict is obtained for the interruption of a stream which causes no actual damage to those below, a Court of Equity has no discretion, but is bound to grant an injunction, I think it goes beyond what the *English* cases warrant. The doctrine I draw from all these cases is, that the right of the plaintiff, to the interference of the Court, rests, not solely on its clearly appearing he has a right, or on his having obtained a verdict establishing it, but on his also shewing an interruption of that right, attended with such loss or *actual* inconvenience to him, as on just and equitable principles should be prevented. Judge *Story* seems to entertain the same opinion, for in concluding his Chapter on injunctions he says, "it may be remarked upon the subject of special injunctions that Courts of Equity constantly decline to lay down any rule which shall limit their power and discretion as to the particular cases in which such injunctions shall be granted or withheld."

Such being the discretionary power committed to the Court it is bound to look at all the circumstances and varied bearings of each particular case before deciding. And where the thing complained of, and which it is sought to prevent, is highly beneficial to one party, and not injurious to the other, it is prudent to ponder well before it allows its strong arm to be

called into action. At Law, no inquiry, save into the strict legal right, can be tolerated; here, other matters demand attention. And although we may not attempt to *restrain* a legal right, the case may be such as should prevent a Court of Equity moving to enforce it. Or, if it does move, it should take care so to mould its decree as to meet the ends of substantial justice. The circumstances of the country in which we are, may here, also, properly receive some consideration. And there is high authority for saying that where great and general public inconvenience would ensue, and where the interference of the Court will have the effect of interrupting men in those modes of enjoying property which are innocent in themselves, hurtful to none, and beneficial to all, we should be very cautious how we interpose merely to prevent some possible or contingent evil. In such cases it seems to me, while we acknowledge the jurisdiction, we may (in the words of Lord *Brougham* in *Blakemere v. The Glamorganshire Canal Company*) decline to exercise it any further than is necessary to prevent real injury being done.

In the present case it seems clear that the legal right of the plaintiff, if pushed to its full extent, will almost, if not quite, stop the working of defendants' mills and entirely destroy their value. That, although the penning back of the water at times especially selected by the defendants may be prejudicial to the plaintiff, yet, by doing so under certain restrictions it is hardly possible he can be injured. Under these circumstances it appears to me substantial justice will but be done between these parties by adopting a similar course to that taken by Lord *Eldon* in the *Atty. General* v. *Nichols*, and by the Vice Chancellor in The *Atty. General v. The Eastern Railway Company*, and as I find adopted in many other cases to which I have referred in considering this case, viz., by imposing such terms on the defendants, in using the water, as will prevent actual injury to the plaintiff without rendering their property useless, and declining to interfere further.

There is another consideration which, I think, renders it extremely doubtful whether the plaintiff is entitled to insist on the interference of the Court for the protection of his strict legal right to the full extent he desires. It is a rule of Equity not to interfere if a plaintiff has been guilty of laches, or where by his conduct, he has apparently acquiesced in an encroachment on his rights. In *Smith v. Clay*, 3 Bro. Ch. C. 640,

Lord *Camden* says, "a Court of Equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slumbered upon his rights and acquiesced for a great length of time. Nothing can call forth this Court into activity but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive and does nothing." Now, the defendants mill was erected in 1838. Granting that it was not worked so regularly as it has been for the last few years, yet it was worked, and must almost daily have interrupted the natural flow of the stream. Yet the plaintiff allows those in possession of the upper mill to interfere with the water, apparently, without much objection, until about 1847. And after the interference had continued for several years, he tells *David Lowther* and *Clarke*, instead of being an injury it was a benefit to him. Now, although these facts do not amount to such a license or statutory bar as would furnish a defence at law, it certainly looks very like slumbering on his rights, and appears to me to approach very near to that state of circumstances in which Lord *Camden* says the Court should be passive and do nothing, except, indeed, so far as is necessary to prevent such an interruption of the water as will not injure the plaintiff's present works.

Looking at the whole of the case, I think, to a certain extent, the injunction should be dissolved, but I think it should be dissolved only to this extent, viz., to allow the defendants to pen back the water for a certain number of hours during each night for the purpose of raising a head, but not to allow them to interrupt it at any other time.

The order will, therefore, be that this injunction, so far as relates to penning back the water, or interrupting the flow of the stream, between the hours of 11 o'clock at night and 4 o'clock in the morning of each day be dissolved, but, that with respect to all other times it be continued.

The question of costs I reserve to the hearing.

——— *v.* IRVING.

At Chambers.

Bankrupt—English protection, 23 Sec., 5 & 6 *Vic.* does not apply to Colonies—affidavit made in *England* must be authenticated by affidavit made in this Court.

The defendant in this case has been arrested under an

execution issued out of the Court for the recovery of Small Debts, for a debt contracted in this Island, and applies to be discharged under the *English* Statute; 5 & 6 *Vic.*, Cap., 122, Sec., 23, alleging that he has been duly declared a Bankrupt in *England*, and that the Commissioner of Bankruptcy there, has, by an indorsement on the back of the Summons, pursuant to the Statute, granted him time until the 20th. of August next, to finish his examination, and that he is consequently not liable to be arrested in this Colony until that time has expired.

This motion is resisted by the plaintiff's counsel on three grounds:—

First.—It is contended that the summons and indorsement thereon are not so authenticated as to prove it really to be a document under the hand of an English Commissioner of Bankruptcy.

Secondly.—That admitting the Summons and indorsement to be sufficiently authenticated, that the 23 Sec. of *Vic.*, Cap. 22, does not apply to the Colonies.

Thirdly.—That if it does, the privilege from arrest in this case, is excluded by the provisions of the Small Debt Act of this Island, 7 *Vic.*, Cap., 3, Sec., 34.

With respect to the first objection, that the proceedings are not properly authenticated, the declaration of *J. Holmes* authenticates the Summons and proceedings in the usual manner, this declaration is certified by the certificate of *Surr*, who describes himself as a Notary Public of the City of *London*, and the fact of his being a Notary Public is certified under the seal of the Lord Mayor.

The affidavit of *William Burnie* which has been made since the Rule was granted cannot be looked upon by the Court; if the defendant wished to use a supplimentary affidavit he should have applied to the Court for leave to draw it up, on reading the supplimentary affidavit. Also *Salloway v. Whorewood*, 2 Salk. 461 is certainly an authority in favor of admitting the affidavit, when only confirmatory of those used in moving for the rule, but *Same v. Same* 2 C. M. & R. 637, where that case was relied on, was determined contrary to it, and in *Bury v. Clench*, 6 Jur. 666, it was laid down that a party must apply to the Court for leave to withdraw his rule and move it again. The affidavit of the defendant does not help his case on this point, as he does not authenticate the proceed-

ings of the commission at all, nor does he swear that his time has been extended, but only that " a further time was allowed by the said *John Sheppard*" until the 20th day of August, now, next " *as appears by the summons and indorsements thereon annexed.*"

The question therefore is, whether the certificate of the Lord Mayor or *Surr*, is a sufficient authentication of the fact that *E. Golbourn* is a Commissioner of Bankrupts, and that the paper purporting to be the Summons is really signed by him. *England* with respect to this question must be considered in the same light as any foreign country. Both Mr. *Tidd* and Mr. *Archbold* in their books of Practice lay it down, that an affidavit made in a foreign country must be authenticated by an affidavit made before an officer of the Court in *England*. In *O'Mally v. Newell* 8 East 372 Lord *Ellenborough* in delivering Judgment on a motion to discharge a party from arrest on an affidavit made out of *England*, says, " we are of opinion that the Practice itself may be sustained in point of law as to affidavits made out of *England* and *verified here*. In *Finch v. Cullamore* 3 M. & S. the signature of the Chief Justice of *Ireland* was *verified* by affidavit *made in England*. Some cases have been decided where acknowledgments of fines by married women were directed to be taken on affidavit made out of *England*, and certified by a Notary Public, but they appear to rest on the provisions of particular statutes, rather than on any general principle of law. It was urged by the defendant's Counsel, that though affidavits thus authenticated might not be sufficient in ordinary cases (such as arrests for debt for instance,) yet they were sufficient in application of this kind, to call on the other side to answer. But if an affidavit is necessary at all, I can see no distinction between the authentication requisite to satisfy the Court of their being genuine where used in moving for rule, and any other case. In both cases the Court before acting on them must see, first, that the person administering the oath had authority to do so, and secondly, that the signature to the Jurat is the signature of that person. In *Dalmer v. Barnard* 7 T Rep 251 where on shewing cause against a rule for delivering up a Bond and Warrant of Attorney to be cancelled, an objection was taken to an affidavit sworn before the Chief Magistrate of the *Isle of Man* and authenticated by an affidavit made in the Court of King's Bench, it does not appear

to have been thought either by the Counsel or the Court that any such distinction existed; the observation of the Court was, "as to this not being *properly authenticated*, the affidavit of *Christian in this Court* is a sufficient answer. The conclusion, however, to which the Court have come on the second point renders it unnecessary to give any decision on this; had it been necessary we might, perhaps, have required more time to consider before pronouncing judgment."

As to the second point. There is no doubt of the power of Parliament to bind the *Colonies*, where an Act shews a clear intention to do so, and I think it is clear that a "*Certificate*" of Bankruptcy obtained in *England* would be a bar in this Court to an action for a debt contracted here. But the question here is, whether it was the intention of Parliament that the 23rd Sec of 5 & 6 *Vic.*, cap. 122, should extend to the *Colonies*. That section after providing that the Bankrupt shall be free from arrest during such time as shall be allowed him to finish his examination, and for such time after finishing his examination, until his Certificate be allowed and confirmed as the Court shall appoint, goes on to enact, "That if such Bankrupt shall, after his surrender, be arrested within the time aforesaid, he shall, on producing his Summons, signed as required by this Act, to the officer who shall arrest him, and giving such officer a copy thereof, be *immediately* discharged, and if the officer shall detain him after he shall have been shewn such Summons, he shall forfeit to the Bankrupt £5 for every day he shall detain such Bankrupt, to be recovered by action of Debt in any Court of Record at *Westminster*, in the name of such Bankrupt, with full costs of suit." The difficulty an officer would experience in a foreign country, in ascertaining whether the Summons produced by a person he had arrested was genuine or not, must be very obvious, as he must act on it immediately, or at least, after a reasonable time for inquiry into its authenticity. In *England* the Gazette, and many other papers, contain the names of Bankrupts, the dates of fiats &c, and from those, and many other sources, the officer there would have no difficulty in satisfying himself on this point. But how is the officer to do this in a distant country where there are no persons in any way concerned with the *English* Bankrupt Courts, and where no paper published by authority, or otherwise, contains the names of Bankrupts, dates of fiats, or any information on the subject, and where

few, or none, can be supposed to know who the English Commissioners of Bankruptcy are, or be acquainted with their signatures? We cannot suppose Parliament could have intended to impose a duty on the officer, the right performance of which would be so impracticable, and to compel him to discharge his prisoner, merely because he produces a piece of paper, the genuineness of which he has no means of ascertaining, and which, if not genuine, will be no defence for him in an action for the escape of the prisoner, he has (as he supposed) legally discharged. But the Act provides that the Penalty is to be recovered "*by action in a Court at Westminster.*" We are endeavoring to find out the intention. Now, if it had been intended that this section should apply to the *Colonies*, would it have limited the right to sue for the penalty to the Courts at *Westminster*, and, at the same time, make the right to be discharged dependant on the *production of* the summons everywhere? It can only be on the supposition that the officer has, or can obtain satisfactory evidence of the authenticity of the summons, that the Act compels him to discharge his prisoner. Why, then, when the officer is so satisfied, should the Bankrupt not have a right (if improperly detained) to sue for the penalty in the country where it is incurred? We cannot suppose Parliament intended to make the Bankrupt's right to recover the penalty dependant on the improbable chance of his finding the Colonial officer at some future time in *England*. In the case of a "*Certificate*" these inconveniences do not arise, because the Bankrupt must plead it, and if issue is taken on it, must prove it at the trial. The 2 & 3 *Wm.* 4th C. 114, Sec. 9, enacts, that depositions and proceedings purporting to be sealed with the seal of the Court of Bankruptcy, shall be received as evidence of such documents respectively; yet, in *Clark v. Mullick*, 3 Moore P. C. 260, though it was not denied that the property of the Bankrupt passed to the assignees, it was held that that section of the Act did not apply to the *Colonies*. In the Mayor of *St. John v. Lockwood* the Supreme Court of *New Brunswick* refused to discharge a prisoner under similar circumstances

It was urged at the bar that the protection would be of no use unless the Bankrupt could go to the country where his books and the bulk of his property is, and it is also stated in the defendant's affidavit, that he came here to assist in collecting his debts, but I do not see that it was necessary for him to

come here before obtaining his Certificate. All that is required in the Bankruptcy Court is, that the Bankrupt should make *a full disclosure of his affairs*, if his books were here he might have had them transmitted to him in *England*. The argument that his presence here was necessary to collect his debts, tends to shew the danger of acceeding to such applications, as a Bankrupt might then gather up his books, and such effects as he could lay his hands on, and by leaving the Colony before the protection expired, go where he pleased, or he might go to *England*, and in one month after this Court had discharged him from arrest, he might be refused his Certificate there, and then become liable to be arrested again, but the creditor here who had been diligent and arrested him must lose his debt, as the Bankrupt would then be beyond the jurisdiction of the Court. The English creditor, on the contrary, at whose suit he might have been discharged, could watch the proceedings and when the Certificate was refused, arrest him again, thus, the application of this section to the *Colonies* would have the effect of placing the *Colonial* creditor in a much worse position than the *English* creditor. Again, during the running of the protection, and before a full disclosure, and while his property is in some degree under the Bankrupt's control, if the Bankrupt was found to be secreting his books, or making away with his property &c, the Court in *England* could withdraw the protection at once and take measures to preserve the effects; but if he were found doing so here, what power has the *English* Court of Bankruptcy over him here? He is beyond their immediate control, and the creditor here might see him making away with property which ought to be applied in liquidating his debt, and yet neither be able to arrest him, or procure the interference of the Bankruptcy Court in time to save it for him. These last reasons, it is true, only shew the inconvenience which might arise from the operation of this section in the *Colonies*, but where the language of a Statute is ambiguous such reasons are entitled to consideration, as if Parliament had intended a section which might so operate to apply, the intention would have been clearly expressed, and not left in uncertainty. We are, therefore, of opinion that this section does not apply here, and, therefore, this Rule must be discharged.

As to the third point, the defendant does not claim any privilege *not to be sued* in the Small Debt Court, and, there-

fore, is not within the 34 Sec. 7 *Vic.* Cap. 2. The section applies only to cases of privilege to the person, in consequence of some office, as "an attorney," for instance, and not in cases where the defence is, that the action is barred in all Courts.

Rule discharged.

PIDWELL v. M'DONALD.

At Chambers.

Summary suit—Debt reduced by payment—Balance due if under £20 may be sued for on Summary side.

The plaintiff in this case brings his action on the Summary side of the Court, he states that the defendant agreed to give £30 for the rent of a house (under certain contingencies which happened); he proves that £15 have been paid, and he sues for the balance. The defendant contends that the house was only taken for half a year, and the amount paid was not a part payment of £30 but in full of all that was due, and that as the plaintiff has to shew an original demand exceeding £20, his action should have been brought on the Record side, and he therefore pleads in abatement to the jurisdiction.

The Act for the trial of causes in a Summary way 24 *Geo.* 3 Cap. 13 sec. 1, provides "that in all actions of debt case &c., where the sum or damages demanded shall not exceed £20, the plaintiff may proceed in a summary way. Numerous cases were cited at the bar which have been decided on the *English* Court of Request Acts, some of which turn on the particular provisions of acts dissimilar from this, and have no application to this case; but others, on acts very similar to that on which this question is raised. Several cases were adverted to, where the debt was reduced by set off, and which were held not to be within the Acts, because, as the plaintiff could not compel the defendant to put in his set off, the plaintiff could not know whether the set off would be brought forward or not; but those cases do not apply here, because, if the debt in this case is considered as reduced at all, it is reduced by *payment.* And where a debt is so reduced the general tenor of the authorities is, that as the plaintiff knew that he had received payment, he might give credit for it, and sue for the balance. The act authorizes the action on the Summary side where the damages *demanded* do not exceed

£20. According to *Shaddick v. Bennet* 4, B. & C 769 and *Drew v. Coles* 1 D. P. C. 680, (the first decided on the London Court of Requests Act, and the other on the Bedford Court of Requests Act, the sections of which are in effect, similar to the Island Act); the amount recovered, (unless reduced by a set off), is the criterion of the amount demanded. In the present case, all the plaintiff ought to recover after giving credit for the payment was the balance under £20. The debt demanded is, therefore, under £20, and so within the words of the Act.

But it was contended by the plaintiff's Counsel, that in this case as the plaintiff had to establish his right at one time to a sum of £30 which is disputed, and, as the jury would have to decide that before his right to a verdict for anything could be established, therefore, the class of cases to which *Coles v Drew* and *Shaddick v. Bennet* belong, do not apply; and at the trial it appeared to me that this view of the case was correct but on close examination I think this view erroneous. In all cases where the debt has been reduced by payment, evidence of the larger amount must be given before it can be shewn to be reduced by payment. In *Horn v. Hughes* 8 East 346 the plaintiff's witness proved a debt of £6 9s 0d, and then proved £2 paid and it was held to be within the London Court of Request Act, the wording of the 12th section of which Act is not essentially different from the 1st section of our Summary Act. The cases which appear contrary to this doctrine are decided on statutes containing a special clause restraining the jurisdictio to causes where the *original* demand did not exceed £5.

It is further urged by the defendant's Counsel that if the plaintiff satisfies himself with proof of the last half year's rent, then they have a right to put the judgment against it, and then there is nothing due, and the *dicta* of the Judges in *Woodham v. Newmans* 18 Jur. 456 is cited in support of this view of the case. But in that case the debt was reduced by set off; the judges in giving judgment put the case of a party having a large demand, waiving part so as to sue in the cheaper Court, in which case, as you cannot compel a man to set off his account, the defendant might bring his set off and defeat the suit or sue for it again, though in reality paid in the amount *waived* by the plaintiff before he sued; but in this case the plaintiff does not waive any part of his demand he

says "I had a demand against you for a year's rent, you paid me half a year's rent, contending that you owed no more. I have sued you for the other half and if you were ever liable for that you owe it still." It is true the party who makes payment may appropriate it to any account he likes, but when he once does so he cannot afterwards change it. Here the defendant himself appropriated it at the time of payment to the first half year, denying that he owed the second, he cannot now therefore say, I will appropriate the payment to the last half year for which you sue. The question as to the effect of the plaintiff receiving the money which was offered in full cannot arise in this stage of the cause in which issue is taken on a plea to the jurisdiction. And as the plaintiff demands a sum not exceeding £20 he has a right to sue on the Summary side,

The rule must be absolute.

M'DONALD v. LONGWORTH.

Hilary Term. 1852.

Absent Debtor—Debtor summoned under Trustee Process not liable to assignee of absent debtor without notice—reasonable time before Assignment—Assignment of chose in action to Trustee without assent of Creditors void against attaching Creditors.

In this case the defendant is sued under the Trustee Process by *Cushing & Clapp*, as a debtor to *Augustine McDonald* (an absent debtor), the plaintiff in the present suit. It appears that on the 11th of Sep. 1849, *Cushing & Clapp*, commenced their action by attachment against plaintiff under the Absent Debtor Act. On the 11th of December, 1849, they caused the summons to be served on the defendant. On the 12th of December the Defendant made a written deposition admitting himself indebted to the plaintiff, *Augustine McDonald*, in the sum of £16 11s 0d. which was put in at Hilary Term 1850. It further appears that in July 1848. the plaintiff, *McDonald*, executed an assignment of all his effects and credits to *John McDonell*, as trustee for certain creditors therein named, according to the priorities therein mentioned, after liquidating whose demands, the trustee was to have the residue of the proceeds to pay an unascertained amount

stated to be due to him. The assignment is by Deed Poll executed only by the assignor, neither the trustee nor any of the creditors are parties or privy to it. On the 11th of December 1849. this action is commenced in plaintiff's name (by the trustee) to recover the debt, for which the defendant is also sued under the Trustee Process by *Cushing & Clapp*. Judgment has been recovered by *Cushing & Clapp* in the absent debtor suit against the present plaintiff, *Augustine McDonald*, and the Defendant has paid over the amount by his deposition admitted to be due to the absent debtor, *McDonald*, to the Sheriff, on an Execution issued under the judgment obtained by *Cushing & Clapp* against the plaintiff *McDonald*.

It is contended, First, that *Longworth*, the Defendant, had not sufficient notice of the assignment, and that having admitted asset, he was bound to pay the amount to the Sheriffs under *Cushing & Clapp's* Execution against the plaintiff, and that he is, therefore, discharged from liability to the plaintiff's trustee, *John McDonell*.

Secondly, That the creditors have not assented to the assignment, and that it is, therefore, void as against *Cushing & Clapp*.

As to the first point, it is positively sworn by the defendant, in his affidavit, that at the time he made his deposition, viz., the 12th December, he had no notice of the assignment, but it appears that at Hilary Term 1850, when the deposition was filed, and at which Term the defendant should have appeared to submit to examination, he was absent in England, and his deposition admitting assets was the only examination taken. The affidavit of Mr. *Palmer*, the plaintiff's attorney, states, that in Hilary Term 1851, when the defendant's deposition was put in and read, he, the said C. Palmer, produced the assignment and duly notified the Court and defendant thereof. But it appears that with respect to notifying the defendant Mr. *Palmer*, must be mistaken, as the defendant was then absent, and that the notification he alludes to must have been given to the defendant's attorney. The defendant should have been there to be examined, or should have applied to have the time for his appearance extended, and, therefore, we think the notice then given must be looked at in the same light as if the defendant had been there and received it himself. The question is, would this be a sufficient notice of the assign-

ment? If it would, then the defendant was bound to state it in his examination, and not having done so, though he made himself liable by admitting assets, to pay *Cushing & Clapp* as attaching creditors, he must still (if the assignment be good) pay the amount over again to the trustee in this suit.

At Common Law a debtor is only liable to be sued by his creditor with whom he contracted, The Absent Debtor Act extends this Common Law liability and subjects him, under certain circumstances, to be sued by a third person, between whom and himself no privity of contract exists. If the debtor's creditor assigns the debt to a trustee, the trustee has only an equitable right to the debt assigned; all that is necessary to protect the debtor from injury is notice from the trustee of the assignment, and then he is in Equity liable to pay to the trustee, and, as at common Law, he can only be sued in the name of his creditor, he is in no danger of being compelled to a double payment of his debt, but where the Common Law liability is statutably extended and he is subjected to an action not only by his creditor, but, also, by a third person with whom he never contracted, the trustee, to whom the debt is assigned, must, necessarily, do something more to protect him than merely give him *notice* of the assignment. He must, also, furnish him with the means of making a good defence to the action brought by such third person against him, and as the time for making that defence under the Trustee Process, is the time at which the debtor, served with such Process, comes in to be examined, it follows that the means of making such defence must be furnished him by the trustee in sufficient time to enable him to set it up, for if this is not done the person suing under the Trustee Process must recover against him. And this appears to be the doctrine of the Courts in the *United States* in acts, though more particular in their provisions, yet similar in principle to our own. Mr. *Angell*, in his book on Trustee Process, says, "A mere notification by the assignee that the debt is assigned to him is, doubtless, sufficient to protect his rights against a mere voluntary payment by a debtor."

"But such notification will not relieve the assignee from his obligation to furnish the debtor with the means of a defence against the assignee's creditor, if he neglect to do so, and in consequence of such neglect, the debtor be adjudged the trustee of the assignor, the assignee will lose his right to

recover the debt, even though his failure to furnish the debtor with the means of defending himself against the Trustee Process, be, in consequence of his ignorance of its existence, and even though the debtor have previous notice of the assignment, and neglect to inform the trustee of the service of the writ upon him."

Now taking the offer made by Mr. *Palmer* when the defendant's deposition was read, as notice of the assignment, would that be furnishing the defendant with legal and sufficient evidence of the assignment *in time to enable him to set it up as his defence?* We think not. The mere production of a deed is no evidence of its authenticity. The defendant must have a right to have the assignment given to him in such *reasonable* time *before* his examination as will enable him to ascertain that it is authentic, but he can have no means of making the inquiry if the first notice he has of it be, placing it in his hand when on the stand undergoing examination.

Again, as laid down in *Wood v. Partridge*, 11 Mass. Rep. 488, the debtor sued under the Trustee Process may, if he please, take the responsibility on himself of determining upon the validity of the assignment, and may refuse to state it in his answer, and then he will be charged as trustee of the assignor under the Trustee Process, and will also be liable to pay the debt to the assignee if the assignment prove valid. But in the majority of cases the defendant would not be able to form any correct conclusion as to the validity of an assignment placed in his hands while under examination.. If he has the right of determining its validity he must be entitled to have the document, or an authentic copy of it, furnished to him in such time before his examination, as will afford him a reasonable opportunity of perusing the document and ascertaining whether it be valid or not. What is a reasonable time must depend on the particular circumstances of each case, but we are clearly of opinion that in the present case evidence of the assignment was not furnished the defendant in sufficient time.

The conclusion we have arrived at on this point renders a decision of the other unnecessary, but as cases of this kind are becoming more frequent it is as well to consider it also.

In all cases of voluntary assignments to trustees for the benefit of creditors, until the creditors have assented, the

assignment is looked upon, both at Law and in Equity, as a mere power given by a debtor to his trustee to apply the property in payment of his debts, and is, therefore, revocable by the debtor. Thus in *Gerrard v. Lord Lauderdale*, 2 Russ, and Myl. 451, property was conveyed to trustees to sell, and after satisfying certain specified claims, to divide the residue among scheduled creditors, none of whom were parties or privies to the execution of the deed. The trustees after partially executing the trusts, concurred with the assignor in doing acts inconsistent with the subsequent trusts. It was held that a scheduled creditor could not enforce the execution of the trusts against the trustee, the conveyance being in the nature of a private arrangement for the personal convenience of the assignor and vesting no right in the creditors. And the same doctrine is laid down in *Waylan v. Coutts* 3 Merrio. 717, and *Acton v. Woodgate* 2 M. and R. 492.

The Absent Debtor Act 22 *Geo.* 3 Cap. 9, provides that "all the goods, effects, credits, and estate of any kind whatsoever, of such absent or absconding debtor in the hands of his attorney, factor, agent or trustee, or under his care, or management, at the time of his being served with the summons" shall be liable to the execution granted in the judgment against the absent debtor in the attachment suit. Now if a voluntary assignment to a trustee be a mere direction of the mode in which the trustee is to apply the proceeds, and be revocable, the absent debtor may remove the property assigned at any moment, and it is, in fact, as much under his control as if no assignment had been made. And it is difficult to see how an assignment operating only in that manner, can interfere with the right of attachment given by the Statute "against all the goods, effects, and credits, of any kind whatsoever" of the absent debtor in the hands, or under the management of his "agent or trustee," unless a mere power of attorney given by an absent debtor would have the same effect, which, it is quite clear, it would not. It is true Mr. Justice *Story*, in his book on Equity 302, lays it down that the assent of creditors will be presumed until the contrary appears, and that an assignment *bona fide* made by a debtor and assented to by the assignee, will be a valid conveyance and good against creditors proceeding adversely by attachment or seizure in execution for the property thereby conveyed, at least, unless *all* the creditors for whose benefit the assignment is made repudiate it.

The only *English* cases cited by Judge *Story*, for this proposition, are *Small v. Marwood*, 9 B. & C. 300, and *Pickstock v. Lyster*, 3 M. & S. 371. But *Small v. Marwood* only decided that the deed was not void, and as it contained a release, that a trustee who was also a creditor, had by executing it, extinguished his debt. And in *Pickstock v. Lyster* it was held that a voluntary assignment, though not executed by the creditors, was not void under the Statute of *Elizabeth*, and as the legal title to the property thereby conveyed vested in the trustees it was not liable to be seized under an execution against the assignor.

But though an assignment which is not *void* under the Statute vests the legal title to the property in the trustee, and is sufficient to defeat an execution which can only operate on property, the *legal title* to which remains in the debtor, it does not necessarily follow that it must defeat an attachment under this Act.

The object and policy of the Absent Debtor Act seems to be, to furnish a local remedy against the property of a debtor, who, by withdrawing himself from the jurisdiction of ordinary process, deprives his creditors of the usual means of enforcing payment of their debts. For this purpose, it not only allows a creditor to attach the property of his debtor before any debt is adjudged to be due, but it also permits the debtor, by the Trustee Process, to attach debts and credits which an execution could not touch. Now if a deed which (for want of the assent of creditors) is revocable by the debtor, can prevent an attachment, it appears to us that the object and policy of the Act may be entirely defeated, in as much as the debtor would then have power to suspend the right of attachment, by a deed depending for its validity on an assent which might never be given, and which, by exercising his power of revocation, he himself may prevent from being given.

Again, the object of the Act seems to be, to afford a local remedy to creditors. But an absent debtor may assign to a trustee who is also beyond the jurisdiction; if the assent of creditors is to be presumed, the assignment must operate from the moment of its execution. Then, if the trustee be absent, the local remedy of creditors is gone. The body of the debtor is beyond their reach, and during the interval, before they can notify their assent to the trustee so as to bind him to hold the property assigned, the debtor may have revoked the deed and

resumed possession. Such a doctrine would open a wide door to frauds on creditors; a friendly trustee might withdraw large assets from the jurisdiction of the attachment law, and hand them over to the debtor in a foreign country, and which, but for the deed by the debtor's own act made void, might have been secured for them by attachment.

But there is another reason particularly applicable to this case, where the subject matter in dispute is a mere chose in action. This cannot be assigned at law. The legal title to it still remains in the absent debtor. When, on examination, a trustee sets out an assignment, it is in the nature of a plea in bar to the Trustee Process. What would be the substance of a plea disclosing these facts? It would be this, that the legal title to the chose in action still remained in the absent debtor, who, then, and still has full power to apply the proceeds in any manner he may see fit. We think such a plea under both the words and policy of the Act would be bad, and if so, any assignment so long as it remains revocable by the assignor cannot defeat a creditor proceeding under a Trustee Process. And this seems in accordance with the doctrine held by the Courts of *Massachusetts* and *Maine* on similar Acts. Mr. *Angell* in his Treatise on Assignments 173 says, "The Courts of *Massachusetts* have considered, that the establishment of a trust estate for the benefit of creditors, not expressly assenting thereto, is contrary to their local policy. It is viewed as a naked trust, which, however good at law has been deemed from the defect of a Court invested with Chancery powers, and from the nature of the attachment laws of that State utterly void as regards attaching creditors."

In a late case in *Maine* the Court says, that by the decisions of *Massachusetts* prior to the separation, and the practice of both States since, so far as they were informed the rights of an attaching creditor have been preferred to those creditors who had not actually assented prior to the attachment.

In *Quincy v. Hall*, 1 *Pick*, 357, it was held, that an assignment by bill of sale, where the trustee merely gave his promissory note to the debtor without any indorser or other security, or any agreement to perform the trust, and some of the creditors assented to the assignment verbally, and others not at all, was void against an attaching creditor.

In this case the affidavit states that the creditors assented with the exception of *Cushing & Clapp*, but it does not

appear that they assented before the attachment, or in what manner the attachment was made, not that we mean to hold that the assent must be in writing, but the acts which are supposed to constitute the assent should be stated that the Court may judge of their effect.

Whether such express assent of the creditors is necessary to defeat an attachment when the subject matter assigned is a chattel, or other thing, the legal title to which, by the deed or delivery vests in the trustee, we are not now called on to decide.

But on both grounds we think the present Rule must be discharged.

M'KINNON *v.* M'KINNON.

Hilary Term, 1852.

Ejectment—Estoppel by acts and conduct.

The only point in this case not disposed of during the argument was, whether the plaintiff by his acts was estopped from treating the defendant as a trespasser.

It appeared that the *locus in quo* had been granted to the plaintiff while young, and when he resided with his father, who had occupied the lot. Indeed, from the evidence it would appear that the grant had been taken out by the father in the plaintiff's name, to avoid some official regulations which prevented more than a certain quantity of land being granted to one individual. But plaintiff had, at several times, exercised acts of ownership sufficient to prevent the *Statute of Limitations* operating against him; there would, therefore, be no doubt of his right to recover in this action if he is not estopped by his subsequent acts.

It appeared from the evidence that *Hugh McKinnon* deceased, (plaintiff's father) in making a disposition of his property amongst his children, had agreed with plaintiff to give him a deed of a piece of land called the Sherman place, on which plaintiff resided, but the title to which still remained in the father, provided he would make over his right to the *locus in quo* to plaintiff's sister (the defendant's wife). It further appeared that the father, to secure performance of the plaintiff's promise to make over the *locus in quo* to his sister,

some short time before his death delivered the conveyance of the Sherman place to his wife (plaintiff's mother) as an escrow to be delivered to the plaintiff on his making over the *locus in quo* to his sister. The testimony of *Angus McKinnon* on this point was as follows;—"I occupied the lot in question with the rest of the cultivated land for twenty-two years after my father's death, I thought it was my sister's, (defendant's wife) because one day I was present when my father spoke to the plaintiff about making the swap for Sherman's place, *Malcolm* said he would do it. My father said, didn't I tell you so," (it appeared that some of the family had expressed a doubt to the old man whether the plaintiff would perform his promise to exchange after he got the deed.) "Father then said, well, when you sign the deed of the lot, here is the deed of Sherman's place, and he then gave the deed to his wife (plaintiff's mother) and told her not to give it to the plaintiff till he signed the other, as the Sherman place was as good to her as the lot," and this testimony was confirmed by other evidence. The plaintiff, after the father's death, being about to sell the Sherman place, required the deed. It appeared that a deed of the *locus in quo*, from plaintiff to his father, had been prepared during his life, but not executed, and now, (after the father's death) plaintiff executed the deed, but the description of the grantee was not altered so as to apply to *Hugh McKinnon* the defendant, so that the deed on its face purported to be a deed to *Hugh McKinnon* deceased, and he delivered this deed to his mother as a transfer of his right to the *locus in quo*.

I told the Jury that the deed of 1820 being made to a person then dead passed nothing, but that if they found plaintiff and his father had agreed to the exchange, and that the father had given the deed to plaintiff's mother to hold till he made over his right to the *locus in quo* to his sister, as stated, and that the plaintiff had afterwards, on delivering the deed of 1820 to his mother, obtained the deed of the Sherman place from his mother, on the understanding that he, thereby resigned his title to the *locus in quo* to his sister, (the defendant's wife) in pursuance of the agreement made with his father he was now estopped from treating the defendant as a trespasser.

It is unnecessary to notice all the authorities cited on the argument. The principle laid down in *Pickard v. Sears* 6 A. & Ell. 474, and confirmed by *Freeman v. Cooke*, 2 W. H. & Gordon 660 is, that where one by his conduct wilfully causes

another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is estopped from averring against the latter a different state of things; here the plaintiff leads his mother to believe that he relinquishes his right to the *locus in quo* to his sister in pursuance of the agreement made with his father, and in that belief she gives up to him the deed of the Sherman place, which plaintiff's father has directed her to hold until the plaintiff made over his right to the *locus in quo* to his sister. He therefore clearly induces his mother to act so as to alter the position of his sister, (the defendant's wife) by entirely destroying the interest she as one of the heirs had in the Sherman place. The deed, though it passes no title, is good evidence of the plaintiff's professed intention at the time to divest himself of his right to the *locus in quo*, and coupled with the other evidence shews, that he induced his mother to act on the belief that he then and there made over his right to his sister. We think after this he is estopped from treating the defendant as a trespasser.

At the time of executing the deed something was said as to whether it made any difference that the *Hugh McKinnon* named in the deed, was the father, and not *Hugh McKinnon* the defendant, and plaintiff replied, "if it made any difference he had a *Hugh McKinnon* himself, his own son." Much argument was raised on this, to shew that the plaintiff by this expression evinced that he did not intend to divest himself of his interest, and undoubtedly if he had shown that, he would not be estopped, because then, the mother could not be considered as acting in the belief that his title to the *locus in quo* was relinquished; whether this expression manifested any such intention was left to the jury, and they must have found that it did not shew that the plaintiff then considered, or wished others to consider, the transfer void, and we think they have drawn a correct conclusion. The expression makes against this idea instead of supporting it, for it shows that the plaintiff must have thought the deed sufficient to pass his interest, else how could it confer it on his son, and if it was considered sufficient to transfer the title to *his son Hugh*, why should he or others think it insufficient to pass the title to *Hugh the defendant*, who, under the agreement with plaintiff's father was the person entitled to it.

It was also urged that the transaction took place with the

mother, that defendant's wife was not a party but is a stranger to it, and that as estoppels only bind parties and privies, the plaintiff is not estopped as against the defendant. The position that estoppels only bind parties and privies is no doubt correct. But here *Mrs. McKinnon* the mother held the deed of the Sherman place as an escrow. She was the agent of the plaintiff and his sister. She was from her position the person to determine when the plaintiff fulfilled the condition entitling him to receive the deed of the Sherman place, and the transaction, between her and the plaintiff with respect to it, appears to us as strong as if the sister had been present and assented to the giving it up on receiving the defective conveyance of the *locus in quo*. To hold otherwise would be to defeat justice, by setting up one of the technical doctrines of estoppel, which the Courts at the present day as stated by *Mr. Smith* in his Leading Cases 459 incline against. He says, 'the truth is that the Courts have been, for some time favorable to the utility of the doctrine of estoppel, hostile to its technicality. Perceiving how essential it is to the quick and easy transaction of business, that one man should be able to put faith in the conduct and representations of his fellow, they have inclined to hold such conduct and such representations binding in cases where a mischief or injustice would be caused by treating their effect as revocable. At the same time, they have been unwilling to allow men to be entrapped by formal statements and admissions, which were perhaps looked upon as unimportant when made, and by which no one ever was deceived or intended to alter his position. Such estoppels are still, as formerly, considered *odious*."

Rule discharged.

MITCHELL v. HARVIE.

Easter Term, 1852.

Lieut. Governor may pardon prisoner before or after trial, but cannot, without pardon, order him to be discharged before trial—In action for escape, plaintiff must prove some damage.

This was a summary action on the case against the defendant as keeper of Queen's County Jail for an escape.

From the facts admitted by the Counsel on both sides, it

appeared that one *Alexander White*, a private in the 38th Regiment, was charged by the plaintiff with stealing his watch, that he was taken before a magistrate, examined, and duly committed for trial on the twelfth June, 1851, that before the sitting of the Court at which he could have been indicted, the defendant discharged the prisoner under the following order from the Lieut. Governor:

GOVT. HOUSE, P. E. I.,
19th June, 1851.

TO THE SHERIFF,
for Queen's County.

SIR;—You are hereby authorized to deliver over to his commanding officer, Capt. Leckie, of Her Majesty's 38th Regt., Alexander White, a private in that corps, who is presently confined in the Jail of Charlottetown, on a charge of theft, and also of an assault.

A. BANNERMAN,
Lieut. Governor.

The prisoner left the Island before the Trinity Term, so that the plaintiff could not prosecute him. At the Trinity Term the Grand Jury made the following presentment:

"That on the 10th day of June, instant, one *Alexander White*, a soldier of the 38th Regiment, in *Charlottetown*, entered the house of *Gerald Mitchell*, of Charlottetown Common, and did steal and carry away a silver watch, valued at £6, currency, the property of the said *Gerald Mitchell*, and the jurors further present that the said *Alexander White* was committed to Jail by *Theophilus Desbrisay*, *John Morris*, and *John B. Cox*, three of Her Majesty's Justices of the Peace for Queen's County, in order that the said *Alexander White* should be tried for the said offence at the Supreme Court to be held on the last Tuesday in June, aforesaid, and further, the jurors present that the Jailor of the said County in whose custody the said *Alexander White* was placed by virtue of the commitment from the three Justices aforesaid, did discharge and liberate the said *Alexander White*, and that he cannot now be found to answer the charge preferred against him."

The plaintiff had lost the watch, but it was not found on the prisoner, nor has the defendant ever had it in his possession or seen it. The value of the watch was found to be about £6. With the *exception of the commitment by the magistrates* no evidence was given to shew that the prisoner had taken the watch.

Three questions were raised on the argument:

FIRST—Whether the order of the Lieut. Governor justified the defendant in discharging the prisoner?

SECONDLY—Even if it did not, the committal being for a criminal offence, whether an action will lie against the Jailor at the suit of a private person for an escape?

THIRDLY—That supposing the action will lie, whether the plaintiff must prove that the watch was taken by the prisoner before he can recover?

As to the first point, it was argued by the Attorney General, that the Governor has power to pardon and might therefore legally discharge the prisoner. There is no doubt that the Governor may pardon and the pardon may be before as well as after conviction. Thus in 5 *Com.* Dig. 172 it is laid down, "The King may pardon any crime or offense before attainder or conviction," and this he may do though the prosecution be carried on by a private person, unless the prosecutor has an interest in the judgment. *Hall's* case 5 Rep. 5, "*Alice Cooke* libeled *Hull* in the Spiritual Court for calling her a whore and had judgment, from which the defendant appealed, and then obtained the King's pardon, and it was resolved, 1st, that all cases depending in the Spiritual Court between party and party where the suit is only *pro salute animo vel reformatione morum*, as for defamation or laying violent hands on a clerk, or the like, there the King's pardon is a bar of the suit, for the suit is not to recover any damages or any other thing, but only to inflict punishment on the offender *pro salute animo*, which punishment the King may pardon as well before as after the suit began, for, in truth, such suits are *only for the King*, although they be prosecuted by the party, and like suits in the Star Chamber preferred by one subject against another, the King may pardon them, for, although a subject prosecutes them, yet the suits are for the King and to punish the defendants for their offences and misdemeanors by fine and imprisonment &c, to the King. But if one libels for tithes, or a contract of matrimony, or for a legacy, or the like, where the plaintiff hath an interest and property in the thing in demand and sentence shall be given for him for the thing which he libels for, there the King cannot pardon it, neither before nor after the suit begun."

But the order in this case is not and does not purport to be a pardon. A pardon must be under the great seal. If pleaded,

this document would be no defence to an Indictment for the offence mentioned in it. The question is, therefore, whether the Lieut. Governor has power to order the discharge of unpardoned criminals from prison before trial. And in considering this question, he may be assumed to possess the same power as the Sovereign in this respect.

In 1 *Bac.* Abr. 615, it is laid down, "A person legally committed for a crime certainly appearing to have been done by some one or other, cannot be lawfully discharged *by any other but the King* till he be acquitted on his trial, or an *ignoramus* found by the Grand Jury, or none to prosecute him on proclamation for that purpose by the Justices of Gaol delivery." But though it is said a person committed may be discharged by the King, it does not follow that an order for his discharge under the King's signature would be sufficient. Although justice is administered in the name of the Sovereign it is beneath his dignity to attend to the details of its administration. Many acts done in the King's name, and by his authority, can only legally be done by those to whom their execution is entrusted, and who are themselves liable for abuse of their powers. In the *King v. Brown*, 2 Show. Rep. 484, cited in the preface to Foster's Rep. 12 and 2 *Bac* Abr. 23, the defendant was brought up on *Habeas Corpus.*" It appeared the King had requested some of his ministry to commit the defendant to Gaol, but they not having evidence of the defendant's guilt refused to grant any warrant; upon which His Majesty, thinking the defendant guilty, called for a warrant which he signed with his own hand, by which the defendant was committed to the custody of the messenger, and the warrant being taken notice of by the Court of B. R, and the whole matter being considered the Court gave their opinion that the defendant should be discharged, because the warrant was under the King's own hand, and not under the hand of any *secretary or officer of state or justice of the peace.* And the reason given for this hath been that the King having given all his executive powers to his Judges and Justices of the Peace, there is none left in him, the executive power being too mean and troublesome for His Majesty, and if the King erred ever so much there is no remedy against him, but there is a remedy at law against any subject whatsoever." Here though the party might legally be committed in the name, and by the authority of the King, yet, the warrant for

his committal signed by the King was held void. But the precise point now before the Court is noticed in 1 *Burns* Jus. 519, where after citing the authority already quoted from *Bac.* Abr., that a person legally committed for a crime cannot (until acquittal or bill ignored) be legally discharged by any other than the King. He adds in a note, "*that is by some one of the King's Courts, or by some Magistrate duly authorized.*" If the prisoner in this case was improperly committed he might have caused himself to be brought before a Judge on *Habeas Corpus.* The prosecutor and committing Magistrate would then (according to the practice) both have had notice so that they might appear and resist his discharge, and the Judge, after due inquiry into the circumstances, and hearing both sides, if satisfied that there was no reasonable pretence for imputing to the prisoner the offence, would have discharged him, or admitted him to bail. It appears to me, therefore, that the Lieut. Governor had no power to discharge the prisoner, and that the order does not justify the defendant in having permitted him to escape.

As to the second question. The rule of law, founded on a statutory principle of public policy and designed to stimulate the prosecution of offences is, that where a criminal offence has been committed which is also the subject of a civil action, the party injured shall not be allowed to sue for the civil injury until he has first prosecuted the offender by indictment for the criminal offence. The law on this subject was very fully laid down in the late case of *White v. Spettigue*, 13 M. & W. 605. The party injured being thus compelled to postpone his action to recover the value of the property taken from him, until he has prosecuted for the criminal offence, any omission or neglect of duty by those who are bound to assist the prosecutor in carrying on the prosecution, which impedes it and thereby necessarily delays him in bringing his civil action is an injury to him, for which an action on the case lies against the party guilty of such neglect of duty. In *Buller* N. P. 64, it is laid down, "If my servant be robbed and he go to a Justice of the Peace and pray to be examined touching the robbery, and the Justice refuse to examine him, so that I am thereby damnified and cannot proceed against the Hundred, I may have an action against the Justice." The same principle *seems* applicable to the case of a gaoler, who, by allowing a prisoner to escape, hinders the prosecutor from proceeding

with the criminal charge, and thereby prevents his bringing a civil action against him.

The last question then arises, viz., whether the plaintiff must prove the taking of the watch by the prisoner, before he can maintain this action. This was properly likened in some respects, on the argument, to escape on *Mesne* Process, where, if the prisoner escape at any time after the return of the writ, the Sheriff is liable, but he is only liable for such damage as the plaintiff *has actually* sustained; and, if in consequence of such escape, the plaintiff be delayed for the shortest time in the prosecution of his suit, it is a damage in law sufficient to sustain the action. Thus in *Williams v. Mostyn*, 4 M. & W. 152, relied on in the argument, where the party arrested on *Mesne* Process escaped after the return of the writ, the plaintiff had sustained no actual damage, nor been delayed in his suit, and it was held the action would not lie. *Parke* B. says, "there would, we think, be no doubt that if the plaintiff had sued out his writ of *Habeas Corpus* during the defendant's absence from prison, and been prevented from executing it, or had offered to deliver a copy of the declaration during such absence, and had been prevented by the absence from doing so, he would have been delayed, and delay of suit never so short is necessarily a damage." I agree to the distinction taken by the plaintiff's Counsel between that case and the present. That in *Williams v. Mostyn*, the plaintiff only had a right to have his debtor in custody whenever he chose to remove or declare against him, and, if when he did so, he was in custody he could not be delayed; but, that in this case the plaintiff by the escape has an actual impediment thrown in his way which prevents his suing at all until the criminal case is first disposed of. But this would only shew that in this case it was not necessary for the plaintiff to issue a writ against the prisoner, before bringing the action for the escape. The argument does not bear on the real question raised and now under consideration, which is not whether the plaintiff has been delayed in commencing his suit against the prisoner (which appears plain enough), but whether admitting that to be the case it was not necessary to prove that he had a good cause of action against him, which in this case could only have existed by its appearing that he was the taker of the watch.

In all actions for escape on *Mesne* Process it *must be stated in the declaration* and *proved* that the plaintiff had a cause of

action against the party arrested. In *Alexander v. Macaulay*, 4 T. Rep. 611, the declaration stated that the plaintiff had a good cause of action against his creditor, that he arrested him and that defendant suffered him to escape. At the trial the plaintiff was nonsuited, because he *could not prove any debt against the prisoner who had escaped.* In this case the plaintiff must have been delayed in his suit, because his creditor having escaped entirely, he could not have him to declare against at the return of the writ, but as his being unable to prove any debt against the prisoner shewed that the action against him, if he had not escaped, would have failed, he could not therefore be damnified by the escape, and, consequently, had no cause of action against the gaoler. And in the note to *Benson v. Welby*, 2 Sand. Rep. 151, citing the same case, it is said, "It is necessary in this action to aver and prove that the plaintiff had a cause of action against the person who escaped. If it be not averred, the declaration is bad on demurrer, and *if it be not proved as averred* the plaintiff will be nonsuited."

It is true the Court in *Williams v. Mostyn* say, if the plaintiff had sued out a *Habeas Corpus*, or offered to deliver a copy of his declaration during the prisoner's absence, that would have been a delay sufficient to maintain the action; but it is not said it was unnecessary to prove the debt against the prisoner. No such question was raised, because, no doubt, the plaintiff had proved that at the trial, and the only question was, whether the escape had caused damage to the plaintiff by delaying him in the prosecution of his suit against the prisoner, in which he had shewn he would have recovered. Mr. *Starkie* page 1043 lays down the proof necessary in such cases very clearly. "The damage resulting to the plaintiff, that is, either that the plaintiff has been delayed in recovering his debt, or that he lost it or is likely to lose it. For this purpose he must prove the original debt as averred in the declaration, with the same degree of particularity, as it seems and no more, than would have been requisite in the original action against the debtor himself." So in an *American* case *Riggs et al v. Thatcher*, 1 *Greenleaf* 68, it is said, "The action cannot be maintained unless the plaintiff had a valid subsisting cause of action against the person escaped."

From these authorities it is clear that in all actions for escape, the plaintiff must prove, first, the debt against the

prisoner; second, the escape; third, that he had been damnified by it, and if he fail in any one of these requisites, he will fail in his suit. And I can see no distinction in principle between the proof necessary in such cases and the present.

It was urged by the plaintiff's Counsel, that the plaintiff had a right to bring his action against the prisoner, and that as the escape necessarily delayed the bringing his action, his *right* had been injured, which entitled him to damages at law, and the *dictum* of *Powell* J. that the *possibility of damage* is sufficient, cited in 2 *Starkie* on *Evidence* 364, was relied on. But if the plaintiff could not recover in an action against the person escaped, he could not possibly be injured by the escape, as its only effect would be to prevent his going on in a suit in which he would be unsuccessful.

But it is a mistake to suppose that the doctrine that a mere injury to a right, where no actual damage has been sustained, applies to such cases as this. In all actions on the case *damages* are the gist of the action, and they must actually have occurred or an action will not lie. They may be very trifling, they may be only nominal, but still they must have occurred. The person who arrests his debtor has a right to have him in prison at the return of the writ to declare against, but unless he shews that he actually offered to deliver a declaration in his absence, he cannot maintain an action for the escape, because he has not actually been delayed one moment in taking any step towards the prosecution of his suit. But if he has offered to deliver a declaration in the defendant's absence, although the prisoner be there ten minutes afterwards so that the declaration could then be served, yet there has been actual delay for which (and not for any injury to the abstract right) the law gives him nominal damages.

It is true there are cases where mere injury to an abstract right will be sufficient to maintain an action, such as surcharging Commons; diversion of water courses, &c, but those cases are necessary exceptions to a general rule, because in such cases unless an action would lie to preserve the right, its repeated infringement might, in the end, ripen into a title in the intruder, or be used as evidences to bar the right of the party legally entitled to it.

There being no evidence in this case that the watch was taken by *White*, the plaintiff must be nonsuited.

IN THE MATTER OF MARTIN BRENAN.

Michaelmas Term 1852.

Support of poor relations—Son-in-law not liable under 7 *Vic.* Cap 7, to support wife's father.

This is an application to set aside an order of Justices of the Peace, made under the Act 7 *Vic.*, cap. 7, for compelling persons to support their poor relations. The objection is that the order is made against a son-in-law, who it is contended is not liable under the Act. The Statute only provides for the support of natural parents. It does not oblige the maintenance of any relative who is out of the line of consanguinity. The son-in-law is therefore not liable to support his wife's father.

The Rule for setting aside the Justices' order in this case must therefore be made absolute.

WHITE *v.* WHITE.

Michaelmas Term, 1852.

Father and Son—Where a son continues to work with father after 21 without agreement for wages—action will lie if circumstances show some remuneration was to be made though amount to be fixed by father.

This was an action brought by the plaintiff against his father, the defendant, for wages. Defendant is a shipbuilder, and has several sons, most of whom learnt their trade with him, and who after coming of age, continued to live and work with him in his yard as before. No express agreement for wages was made with any of them; as the sons left his employ he gave them what he thought right for the time they had served. The plaintiff left in 1848. The defendant offered him a piece of land worth between £100 and £200, which the plaintiff refused to accept, and he now brings his action.

For the defendant it was contended, that as this was a transaction between father and son, to entitle the plaintiff to recover, it was necessary to prove an express agreement to pay wages, and that having failed to do so, the plaintiff must be nonsuited. I left the case to the Jury, reserving leave to move to enter a nonsuit. The Jury found for the plaintiff £100.

The question for the Court how is, whether a son continuing to live with his father after his majority, and working for

him in the same manner as before, can maintain an action the same as a stranger.

In ordinary cases (between strangers) proof of service is evidence from which an agreement to pay is presumed. But when a child continues to reside with his parent after his majority, the presumption is, that the service was gratuitous, unless an express agreement, or circumstances which shew an understanding between both parties to the contrary be proved. That such is the rule appears clearly from the cases of *The King v. the Inhabitants of Stokely*, 6 T. Rep. 758, *The King v. the Inhabitants of Low*, 1 B. & Ald. 178, and *Andrews v. Foster*, 1 Vermont Rep. 556.

It was contended for the plaintiff that the circumstances of this case shew that he was to have wages like another workman. The evidence of *James McEachren* must be laid out of the question, as it related to a conversation with the defendant some years before the plaintiff came of age, as must also the evidence of *Ewen McMullan* which relates to what defendant said he *had* allowed *John* and *James*. The plaintiff's case must, therefore, rest on the evidence of *James* and *William White*. *William White* expressly says he had no agreement with his father, and from the evidence of both it appears, that there was no agreement between the defendant and his sons, but that they expected he would make them an allowance on leaving, and he accordingly did so to each.

This evidence did not appear to me sufficient to establish an agreement, that the defendant should pay the plaintiff, wages in the same manner as he would have been liable to pay a stranger. But it was contended that whether it was so or not, was a question for the Jury and not for the Court,

It is laid down by Mr. *Starkie* p. 543, "That mere preponderance of evidence, such as would induce a Jury to incline to one side rather than the other, is frequently insufficient. It would be so in all cases where it fell short of fully disproving a legal right once admitted, or established, or of *rebutting a presumption* of law." Now it is only from the dealings between the father and his other sons who continued to reside with him in the same way as the plaintiff did, that an agreement to pay him wages like a stranger can be presumed. But the other sons had no express agreement for wages, and from their evidence it does not appear that when they left, *any mutual accounts* were made up between them and the father, though

they must have received money and other things from him during the time they remained with him. And when they left the defendant gave them in money or land, what he thought right. It appears to me, too much to say that from such evidence a Jury could infer an agreement for wages, in the same way as if the plaintiff were a stranger.

But, on the other hand, the evidence seems to me sufficient to rebut the presumption of gratuitous service. This is very different from the case put by the defendant's Counsel of a farmer's son remaining with his father. Here the nature of the business is such, that one competent to perform it, must be entitled to very considerable remuneration beyond his mere maintenance. The time he continued to work (upwards of two years) after he came of age, the fact of the defendant giving a recompense to his other sons, though the amount was fixed by himself, and of his offering recompense to the plaintiff on his leavingt; these circumstances shew clearly that though there was no agreement between them for wages, both parties intended that the services were not to be gratuitous, but that some recompense was expected, the amount of which was to be fixed by the defendant.

The question then arises whether, where a person agrees to accept such remuneration as his employer thinks fit to give him, an action will lie if he is dissatisfied with the amount offered. In *Taylor v. Brewer*, 1 M. & S. 290, the plaintiff performed work for a committee under a resolution entered into by them "that any service to be rendered by him, should be taken into consideration, and such remuneration made as should be deemed right." It was held that an action could not be maintained, the resolution importing that the committee were to judge whether any remuneration was earned.

But in *Jewry v. Busk*, 5 Taunt. 303, where the defendant requested the plaintiff to shew the defendant's house for him, and the defendant would make him a handsome present, and subsequently gave him £2; on the trial *Mansfield* C. J. directed the Jury that this was no evidence of any contract, but that it must be inferred that plaintiff intended to trust entirely to the defendant's generosity, and must, therefore, be content with what the defendant chose to give him, but the Jury, notwithstanding, found for the plaintiff. A Rule to set aside the verdict was refused, the Court being of opinion that there was sufficient evidence of a contract to do work and

labor for a reasonable recompense, the amount of which it was the province of the Jury to establish. And see *Bryant v. Flight*, 5 M. & W, 114.

And in *Bird v. McGahey*, where a verbal agreement had been made by the guardians of a public board with the plaintiff, a surgeon, to attend the sick at an Infirmary, the plaintiff was to receive whatever remuneration the board of guardians should think right and proper. The board offered plaintiff £50 which he refused, and brought his action. It was contended by the defendant's Counsel that the plaintiff could not recover, and *Taylor v. Brewer* was relied on. *Maule* Justice says, "This case is distinguishable from that of *Taylor v. Brewer*, in which the plaintiff proceeded on the contract made by a written resolution; here there was no formal written contract, but a verbal agreement. I will leave it to the Jury to say what the board, acting *bona fide*, ought to have awarded."

These last cases seem to establish that, in a case like the present, an action will lie to recover a reasonable recompense, although by the understanding its amount was to be fixed by the employer.

In the present case the plaintiff would have acted wisely in accepting the defendant's offer, as the Jury have given him less than the defendant offered him.

The rule must be discharged.

TRUSTEES OF ST. ANDREW'S COLLEGE

GRIFFIN, AND OTHERS.

Hilary Term, 1853.

Corporation cannot demise lands by parol.

This was an action of trespass *quare clausum fregit*, by the plaintiffs as a Corporation. It appeared that *Brenan* the Secretary of the Corporation, and *Thornton*, both trustees, had leased the premises by parol to one *Ferguson* for one year and put him in possession. That a day or two afterwards the defendants entered and turned him out and retained possession. It was objected that *Ferguson* being tenant and in

possession, the action should have been brought in his name and the plaintiffs must, therefore, be nonsuited.

The Counsel for the plaintiff, in reply to the motion for a nonsuit, treated the demise to *Ferguson* as valid. The arguments of Counsel on both sides attracted my attention to other points. The answer now given did not suggest itself either to the plaintiffs' Counsel or to the Court. If it had I should have allowed the case to go to the Jury.

The answer to the motion for a nonsuit now made is, that the plaintiffs being a Corporation could only demise by seal, and that the parol demise to *Ferguson* was void.

The question, therefore, for the consideration of the Court is, whether a demise by a Corporation, of lands, without seal is valid?

The general rule of law is, that a Corporation must contract under their corporate seal. But to this rule there are several exceptions, within which the defendants contend this case falls, and they rely strongly on the doctrine laid down in 2 *Kent's* Com. 289, and the *Bank of Columbia v. Patterson*, that whenever a Corporation aggregate was acting within the range of the legitimate purpose of its institution, all parol contracts made by its authorized agents are express and binding promises on the Corporation. But the *American* decisions as stated by *Patteson*, Justice, in delivering the Judgment of the Court in *Beverley v. The Lincoln Gas Company*, 6 A. & Ell 837, have almost entirely done away with the rule, that a Corporation can only speak and act by its common seal. The *English* law on this subject and the principles on which it rests, have beenfully discussed in the recent cases of *Church v. The Imperial Gas Company*, 6 A. & Ell. 851; *Corporation of Ludlow v. Charlton*, 6 Jur. 651; *Lamprell v. The Bellicary Union*, 18 L. Jour. 286; and *Diggle v. The Blackwall Railway Company*, 14 Jur. 937. In the latter case *Alderson* B. says, "the general rule, no doubt, is, that Corporations must contract under their corporate seal, that being the only way by which the governing body of a Corporation can properly express the mind of the Corporation. But to this rule there are some exceptions, all of which, I think, may be classed under one of two heads. First, when the acts done are such as the Corporation, by its constitution, is appointed to do as in the case of trading Corporations, part of whose duty, by their very appointment, being to draw Bills of Exchange, they may do it without

affixing the common seal. Secondly, when the acts are required for convenient management and comfort, as in the cases which have been cited from *Com. Dig*, 'Franchise," F.13, *i. e.* where either the acts are trivial in their nature, or of frequent occurrence, so that the doing them in the usual way would be inconvenient or absurd, or such that an overruling necessity requires them to be done at once, or not at all—here, also, the Corporation may proceed by parol instead of affixing the seal according to the proper and regular course." In the present case what was done by parol might, with equal facility, have been done under the corporate seal. The demise made by *Brenan* and *Thornton* to *Ferguson* was therefore void, and the Corporation are, therefore, properly made plaintiffs.

The case of *Doe dem Pennington & others v. Taniere*, 13 Jur. 119, does not in the least impugn the rule laid down in the cases I have referred to. That case merely decided that the *receipt of rent* by a Corporation, raised a *presumption* against them, that they had demised in such a manner as to bind them whether by deed or otherwise. No such presumption can arise in this case, as *Ferguson* was evicted a day or two after he entered. The plaintiffs never received any rent nor did anything occur which can be construed into a recognition of him as tenant, or as an adoption of the act of *Brenan* and *Thornton*.

The Rule for setting aside the nonsuit must, therefore, be absolute.

DOE DEM COLVILLE & OTHERS *v.* MARTIN.

Hilary Term, 1853.

Ejectment—Statutes of Limitations—When tenancy at will merely converted into tenancy at sufferance, owner barred in 20 years from end of first year of tenancy at will.—Acknowledgement of title under 11 Sec. must admit right to possession—Discovery of new evidence—when new trial granted for, in ejectment.

This was an action of Ejectment tried before me in January 1851. A verdict was found for the defendant, but several important questions were raised at the trial, on which a Rule Nisi, for a New Trial, was granted.

First, It was contended that the lessors of the plaintiff were

barred by the Statute of Limitations, 7 *Wm.* 4 cap. 30. On the part of the defendant evidence was offered to shew that, as to a part of the *locus in quo*, he had, by cutting down and clearing for more than 20 years, obtained a *possessio pedis*, and to shew the lessor of the plaintiff out of possession of the residue he entered into evidence to shew that about 1812, or 1816, one *Donald Nicholson* had entered into possession under an agreement for purchase, made with one *Johnston*, the agent of the lessors of the plaintiff; that *Nicholson* continued to exercise acts of ownership over it until 1819, when he left the Island, leaving his brother, *John Nicholson*, to look after it, who died in 1822, *Donald Nicholson* having previously died abroad in 1821; that shortly after *Donald Nicholson's* leaving the Island, one *Samuel Martin* to whom he was indebted, attached *Nicholson's* property and obtained Judgment, under color of which he entered into possession of the *locus in quo*, and that one *Alexander McLean*, (a nephew of *Nicholson's* and who also administered to his estate) in 1829, bought from *Martin* and had ever since continued in possession. No direct evidence of an agreement for sale to *Nicholson* was given, but a great deal of circumstantial evidence was offered to establish the fact, and the land being in a wilderness state the evidence of *Nicholson* and *McLean's* possession consisted in cutting wood and exercising various acts of ownership over it, and a great number of witnesses were called on both sides. Those on the one side tending to shew that *Nicholson* and *McLean* were in possession, and those on the other, that one *McLeod*, as the agent of, or acting under the plaintiffs, held possession. I told the Jury that if *Nicholson* entered under an agreement to purchase, and he and *McLean* continued in possesion under it, it would shew the lessors of the plaintiff out of possession, and they would be barred by the Statute. The Jury found for the defendant, and in considering the questions raised at the trial, *Nicholson* and *McLean* must be assumed to have had possession, as contended for by the defendant.

In 1834, Mr. *Douse*, the agent of the lessors of the plaintiff served *McLean* with a paper containing a demand of possession, and a short time afterwards served him with a declaration in Ejectment, which was not prosecuted further.

The Counsel for the plaintiffs contend, that assuming *Nicholson* and *McLean* to have been in possession under an agreement to purchase, *McLean* was tenant at will until 1834.

when his tenancy at will was determined by *Douse's* letter, upon which he would become tenant at sufferance, and that, therefore, as there was no existing tenancy at will, in 1837, when the Statute passed, the Statute only began to run from the determination of the tenancy at will in 1834.

It was also urged, on the argument, that I should have left it to the Jury to say whether a *new* tenancy at will was not created in 1834. But if the Counsel for the plaintiff had desired that question to be left to the Jury, he should have said so on the trial, which he did not, and if he had, there was no evidence from which the Jury could infer that a new tenancy was created.

A question of great importance on the construction of the Statute is thus raised, viz: whether a tenancy at will created and converted into a tenancy at sufferance, before the passing of the act will be a bar, provided the tenancy at will and tenancy at sufferance taken together, have continued for 21 years, without payment of rent or acknowledgment of title?

The *English* decisions on the subject appear very conflicting. In *Doe dem Bennett v. Turner*, 7 M. & W. 226, decided in 1840, the defendant entered as tenant at will to the lessor of the plaintiff in 1817, and continued without payment of rent until 1827, when the landlord entered to cut stone, which was held a determination of the tenancy at will, after which he continued without payment of rent until 1850. The Court of Exchequer held, that if on the determination of the tenancy at will in 1827, a new tenancy at will was created, the Statute would run, not from the commencement of the old, but from that of the new tenancy at will but that if on the determination of the old tenancy at will, in 1827, a tenancy at sufferance commenced and continued, so as to comprise 21 years from the commencement of the old tenancy at will in 1827, the plaintiff would be barred.

In *Doe dem Evans v. Page*, 13 L. J. 153, decided in 1844, the Jury found that Mrs. *Evans*, after her husband's death, continued to reside in the cottage as tenant at will to the lessor of the plaintiff, her son, until her death in 1832, when the defendant not claiming under her, but a mere trespasser, stepped into the cottage. The Court held the plaintiff entitled to recover. Lord *Denman*, in giving Judgment, says, "We are of opinion that the 7 Sec. only applies to cases of tenancies at will existing at the time the Act passed, or subsequently

and it does not apply to cases where the tenancy at will had been determined before the passing of the Act." This case is urged as overruling *Bennett v. Turner*. There is this difference, however, between the two cases, that in *Bennett v. Turner* the tenant at will *continued* in possession as tenant at sufferance whereas in *Evans v. Page*, the defendant never had been tenant at will, was not tenant at sufferance, but a stranger who had entered by wrong and held adversely.

Doe dem Angell v. Angell, 15 L. J. 193; *Doe dem Dayman v. Moore*, 15 L. J. 326; and *Doe dem Jukes v. Sumner*, 14 M. & W. 39, seem, certainly, to some extent, to recognize *Evans v. Page*, but the first case turned on the 9th Sec., the last on the 8th, and in *Doe dem Dayman v. Moore*, the tenancy at will existed at the time of the passing of the Act. The main point in *Bennett v. Turner* and *Evans v. Page* did not, therefore, arise.

In *Jones v. Jones*, 16 M. & W. 712, decided in 1847, *Pollock* C. B., in giving Judgment puts the case, " that if for 20 years *before* the Act, the land had been occupied by tenants at will, the Statute would be a bar, but if the tenancy at will *continued* at the passing of the Act, the possession would not be adverse, and the party claiming, would, by the 15 Sec., have 5 years to bring his action." The learned Judge must, evidently, have had in his mind the case of a tenancy at will determined before the passing of the Act, and it seems to me impossible to reconcile his observations with the idea that *Bennett v. Turner* was not law.

In *Doe dem Goody v. Carter*, 11 Jur. 285, decided January 1847, the defendant's husband entered as tenant at will, to his father, *Robert Carter*, before 1824, at which period *Robert Carter* obtained a conveyance of the premises of which he had before been let into possession, under an agreement to purchase. The son (defendant's husband) continued in possession up to his death, in 1834, after which defendant, his widow, continued in possession to the bringing of the action, without payment of rent. In 1829, the father, *Robert Carter*, had mortgaged the premises to the lessor of the plaintiff. Under these circumstances it was contended, that the conveyance to the father, in 1824, or, at all events, the mortgage in 1829, determined the tenancy at will. Lord *Denman*, in giving Judgment says, " Assuming this to be so, still the son would, thereby, become tenant by sufferance, and the twenty years under the Statute 3 & 4 *Wm.* 4 cap. 27, having begun to run long before, would continue to run

unless a *new tenancy at will*, or for some other term were created," (for which he cites *Doe dem Bennett v. Turner*,) and he continued, "and, indeed, the same observation would apply if the conveyance in 1824 were treated as a determination of the will. Now there was no evidence in this case from which the Jury could draw the conclusion, that a new tenancy at will between the father and son had been created at any time within 20 years before the bringing of this action of Ejectment, and, therefore, the determination of the will of the father, either in 1824, or 1829, is not, in truth, material."

In this case, decided three years after *Evans v. Page*, Lord *Denman* not only cites *Bennett v. Turner*, without disapprobation, but determines the very point decided in that case on its authority.

In *Doe dem The Birmingham Canal Co. v. Bold*, 12 Jur. 351, decided in Nov. 1847, only 10 months after *Goody v Carter*, where the defendant became tenant at will to the lessor of the plaintiff in 1824, which was determined by a demand of possession in 1831, it was contended that the plaintiff was barred. The Court held he was not, and Lord *Denman*, in giving Judgment, says, "It was further contended that the Ejectment was barred by the Statute of Limitations but it is clear that the determination of an estate at will before that Statute passed, gives a right of entry commencing at that time."

If this case is correctly reported, the decision appears to be directly contrary to that given in *Goody v. Carter*, by the same Court only 10 months before. It is to be observed that though *Bennett v. Turner*, and *Goody v. Carter*, were cited on the argument, no notice is taken of either case in the Judgment, a circumstance which must create some suspicion, as to the accuracy of the report, as, if the Court considered itself as overruling those cases, Lord *Denman*, in all probability, would have adverted to them especially, as he would be overruling a decision pronounced by himself only 10 months before.

In *Doe dem Carter v. Barnard*, 13 Jur. 916, decided in 1849, *John Carter*, the husband of the lessor of the plaintiff, had 18 years before his death, (which happened in 1834,) been let into possession by *Robert Carter*, his father, as tenant at will, and continued in possession up to the time of his death, after *John Carter's* death, in 1834, the lessor of the plaintiff, his widow, had continued in possession for 14 years. The defend-

ant, a Mortgagee, under a Mortgage made in 1829, shortly before the action was brought, got into possession. The plaintiff contended that the possession of her husband for 18 years, and her own for 14, entitled her to recover. The Court held, that as she shewed nothing to connect her possession with that of her husband, she could not recover under the 34 Sec. But *Patteson*, Justice, in delivering Judgment, says, "*If the plaintiff had been defendant in an action of Ejectment*, no doubt, the non-possession of the lessor of the plaintiff, evidenced by her husband's and her own consecutive possession for more than 20 years, would have entitled her to a verdict on the words of the 2 Sec." At first it might appear from the Court saying that the 2 Sec. would have been a bar, had the lessor of the plaintiff been defendant, that the *dictum of Patteson* would not apply to a question on the 7 Sec. But the 2 Sec. provides that no action shall be brought but within 20 years next after the right to make any entry shall accrue, and the 7 Sec. merely points out when a right of entry against a tenant at will shall be deemed to have accrued, so as to come within the limitation prescribed by the 2 Sec. In the Judgment of *Wilde* C. J., in *Garrard v. Tuck*, 13 Jur. 871, it seems to have been assumed on the argument of this case, that the tenancy at will continued until *John Carter's* death, in 1834, but the facts shew that it was converted into a tenancy at sufferance, by the Mortgage in 1829, and the Court must have so considered it, as if *John Carter* had been *tenant at will* at his death, his estate could not (as held by the Court) have descended to his heir at law. The action was commenced in 1848, and unless Justice *Patteson* had considered that a tenancy at sufferance could be tacked on to a previous tenancy at will, determined before the passing of the Act in 1833, I do not see how he could have thought that the plaintiff, had she been defendant, would be entitled to a verdict, there not being 20 years from the determination of the tenancy at will in 1829 to 1848.

Indeed the case shews that the plaintiff, was the defendant in *Goody v. Carter*, where, on the same state of facts, she succeeded in her defence.

Thus stand the *English* decisions on this point, to reconcile them all does not appear easy. But the construction given to the Statute in *Bennett v. Turner* seems to me most in accordance with its intention.

The 2 Sec. of the Statute limits the right to bring an action to 20 years after the right of entry accrues. The 5 Sec. provides that where the party in possession is tenant at will, the right shall accrue one year after the tenancy at will commenced. The 8 and 9 Sections provide that *mere entry* or *continued claim* shall not preserve the right of the owner, nor by Sec. 11 will an acknowledgment, unless in writing, prevent its operation. These provisions seem to reflect light on the intention of the Statute in cases like the present. The object seems to be to favor the actual occupier, and to discountenance neglected claims. According to all the cases, it converts the occupancy of a tenant at will, commenced 20 years before, and *existing at the passing of the Act*, into a means of depriving the owner of his estate. Now a tenant at sufferance is defined to be "one who enters by lawful demise, or title, and afterwards wrongfully continues in possession." *Com. Dig.*, *T*enant by sufferance." (1). It would seem strange that a Statute so hostile to those who have slumbered over their rights, should be intended to operate on a tenancy at will existing at its passing, and yet not operate on it where it had been converted into a tenancy at sufferance; as, in the first case, the possession being permissive, there would be nothing to excite the owner's vigilance, whereas the wrongful continuance of possession in the latter case would be likely to do so.

Again, the provisions in the 8, 9, and 11 Sections manifest a strong intention to make continuous occupancy, for the period of limitation, a bar, unless accompanied by payment of rent, or acknowledgment of title. The act which converts a tenancy at will into a tenancy by sufferance, is frequently not more hostile to the possession of the occupier than the entry or claim mentioned in the 8 and 9 Sections, while, though the *character* of the tenant's occupation is changed to a lessor one, his *actual* occupation continues uninterrupted. Whether where a tenancy at will has ceased before the passing of the Act, and some other person a mere stranger has got into possession, the owner would be barred, may admit of doubt. *The possession would not then be continuous.* Such was the case in *Evans v. Page*, and looked at as deciding that alone, it would not be inconsistent with *Bennett v. Turner*. See the observations of *Pollock* C. B., in *Jones v. Jones*. It appears to me, therefore, that assuming the tenancy at will in this case

continued until 1834, the lessors of the plaintiff would be barred by the Statute.

But the tenancy at will was, in fact, determined long before. If a tenant at will grants or assigns his lease to another, it is a determination of the tenancy at will, 4 *Com. Dig.* "Estate," (H. 6,) page 61, and *Goody v. Carter*, 11 Jur. 285. If, therefore, the attachment by *Martin* had the effect of assigning *D. Nicholson's* interest in the *locus in quo*, it was a determination of the tenancy at will. But supposing that the proceedings under the attachment had not that effect, it was, at all events, determined by the death of *Donald Nicholson* in 1831; 4 *Com. L.*, [illegible], and *Doe d. Stanway v. Rock*, 4 M. & G. 27, where one *Woolrich* entered into possession of a piece of land under an agreement to purchase, and continued in possession until his death, in 1822, after which his widow continued in possession. It was held that his tenancy at will was determined by his death. So that in the present case there is more than twenty years from the determination of the tenancy at will to the bringing this action which was commenced in 1851.

But it was further contended that *McLean's* letter to *Lord Selkirk* (the *cestui que trust*) dated June 1851, is an acknowledgment which takes the case out of the Statute. The letter in substance states that *Nicholson* had purchased; that the money was paid; that the writer stands in *Nicholson's* shoes and requests "that his lordship would direct his agent to execute the title deeds without further delay and trouble." This amounts only to a demand of a conveyance of the legal estate accompanied by an assertion of an equitable title in the defendant, which would entitle him in Equity to an Injunction against an Ejectment brought to dispossess him. The acknowledgment mentioned in the 11 Sec. must, it appears to me, amount to an admission of the plaintiff's right to the possession of the land. In *Trueloch v. Robley*, 5 Jur. 1101, where the same question arose on the 28 Sec. of the *English* Act, the Vice Chan. holds the letter a sufficient acknowledgment, on the ground "that it was an admission that the plaintiff was owner of the equity of redemption, and that it did not belong to the defendant." In *Doe d. Curzon v. Edmonds*, 6 M. & W. 295, the defendant offered to accept a lease, but expresses his opinion that if contested he could establish a legal title in himself. The offer was not accepted, and the Court held the acknowledgment insufficient. In *Fursdon v. Clogg*, 10 M. &

W. 572, where the acknowledgment was held sufficient, the letter clearly admitted the plaintiff's right to the rent, and begged for mercy.

In the present case the defendant not only asserts his equitable title to a conveyance, but also sets forth a chain of circumstances which, if true, (and in considering this question they must be taken to be true) would give him a good legal title under the Statute, and so far from shewing an intention of abandoning that title, and acknowledging the plaintiffs' right, the statements about a former Ejectment which Mr. *Douse*, the plaintiff's agent, had not proceeded with, and the complaints that Mr. *Douse* had induced a person unable to pay costs or damage, to trespass on the land, instead of rendering himself liable to be sued, evinced his intention to resist their claim. It is impossible to hold this letter a sufficient acknowledgment.

Lastly, the plaintiff moves for a new trial, in consequence of the discovery of new evidence since the former trial.

All the affidavits produced by the plaintiff, except that of *Donald Buchanan* I lay out of the question. First, because the facts deposed to, only go by inference to support or contradict what other witnesses stated on the trial. And, secondly, because they merely shew the exercise of some acts of authority over the land similar to what numerous witnesses for the defendant swore to have been exercised by *Nicholson* and *McLean*, and numerous witnesses for the plaintiff swore to have been exercised by, or under the authority of the lessors of the plaintiff; and, probably, if a dozen new trials were granted, all the persons who had cut or had seen others cut, or talked with *Johnston* about the disputed land, might not have been discovered, and either party who was unsuccessful could bring similar affidavits to support a similar application But the affidavit of *Donald Buchanan* stands in a very different light.

Among other evidence offered by the defendant to show that *Donald Nicholson* was in possession under an agreement to purchase, a letter from *Johnston to John Nicholson* without date, was put in evidence, in which the following passage occurred: "When your brother returns let me have an account of his second purchase, and a description of the land contained in his deed, so as I may see how the matter of the Point ought to be adjusted before I draw *Malcolm Buchanan's* deed, which you heard me promise to do."

The second purchase alluded to in this letter, it was contended at the trial, had reference to the *locus in quo*, and, no doubt, the letter produced a considerable impression on the Jury. The affidavit of *Donald Buchanan* states that *Murdoch Buchanan*, his father, was in possession of ninety six acres under an agreement from *Earl Selkirk*, which 96 acres were bounded on the North, by the farm owned and occupied by *Donald Nicholson*; that *Donald Nicholson* wished to get a piece of this 96 acres, called the Point, to give him access to deep water; that his father had agreed to let him have it, but that he afterwards declined to do so, and, in 1818, got his deed from *Johnston* for the whole 96 acres; and it is contended that this piece of the Point must, therefore, be the second purchase alluded to in *Johnston's* letter, and from this statement it seems highly probable that it is. The question is, does the discovery of this evidence entitle the plaintiff to a new trial? Although this letter, in my opinion, made a considerable impression on the Jury, at the same time, if it had not been produced at all, there was ample evidence to authorize the Jury in finding as they did. Mr. *Archbold*, page 1332, states the practice to be, that, "if new evidence have been discovered after the trial such as to satisfy the Court that if the party had had it at the trial *he must have had a verdict*, the Court will grant a new trial on payment of costs, in order to do justice between the parties." And at page 1336 he says, "In Ejectment, where the verdict is for the defendant, the Court will seldom grant a new trial, because the plaintiff may, if he will, bring a new action, but otherwise, if for the plaintiff, and the circumstances of the case warrant them in granting it." And the same doctrine is laid down in *Adams* on Ejectment 327. In *Weak v. Callaway*, 7 Price 677, where the Court granted a new trial after verdict in Ejectment for the defendant, the affidavits stated a discovery of new evidence which would have entitled the lessor of the plaintiff to a verdict, *and also*, that if a new trial were not granted the lessors of the plaintiff would be obliged to make an entry to avoid a fine.

In the present case it is by no means certain that if the letter, which the new evidence is intended to explain, were not produced at all, the verdict would be for the plaintiff. There was strong evidence of *Nicholson's* possession without it. The testimony of *Martin Martin* that *Johnston*, who sued out the attachment for his father against *Nicholson's* property, told

him to attach the *locus in quo* as part of it, which was done, would, (if believed) it seems to me, in connection with other evidence given at the trial, be looked at by the Jury as almost conclusive, and this testimony is much strengthened by the statement in *John Cantilo's* affidavit (produced by the defendant in shewing cause), that on the deponent's applying to *Johnston* for the land in 1818, he replied "that he had nothing whatever to do with the land now, that it belonged to *Nicholson*," and also by the statement in the affidavit of *Hector McKenzie*, that on his making a similar application to *Johnston*, in 1825, he said "the land belonged to a person then in *Britain* and not on the Island, and that there was none in the Island that could give a title to it, but he thought if any person wanting it would apply to the right owner it could be got pretty reasonable." It was remarked by the plaintiff's Counsel with respect to this last affidavit, that *Alexander McMillan* might have been the person in *Britain* to whom *Johnston* alluded, but this could not be the case as this conversation with *Johnston* took place in 1825, and the deed from *Alexander McMillan* to the lessors of the plaintiff is dated in 1820, five years before. It is difficult to see to whom *Johnston* could have alluded, unless it were the representative of *Nicholson* who, as appears from evidence, was then in *Britain*.

If the plaintiffs right would in this case be concluded by the result of this action, there would be strong reason for the Court's stretching its discretionary power to the utmost in their favor, so as to permit a further investigation; but, as from anything that appears, the plaintiffs can succeed as well on an action commenced in 1853, as on that now pending, I think I should, under the circumstances of this case, be going very far beyond what the authorities warrant, in granting a new trial.

The Rule must, therefore, be discharged.

WEATHERBIE v. GREEN.

Hilary Term, 1853.

Foreign Bankruptcy—Action for debt contracted in New Brunswick barred by certificate of Bankruptcy obtained there. —Act of New Brunswick proved by a Barrister of that Province.

The debt in this case was contracted in *New Brunswick*,

where the defendant became Bankrupt and obtained his certificate.

It was contended that the certificate was no bar. Secondly, that the Bankrupt Act of *New Brunswick* was not properly proved.

As to the first question, it is clear that contracts are governed by the *lex loci*, and, therefore, what is a discharge where the debt is contracted is a discharge everywhere.

As to the second point. The witness *Palmer*, a Barrister practising in *New Brunswick*, proved the printed copy of the *New Brunswick* Bankrupt Act, purporting to be printed by the Queen's Printer, and that it would have been received as containing the Act in the Courts of that Province. All the authorities are reviewed in the *Baron De Bode's* case, 8 A. & Ell. N. S., 259, from which case it is clear, that the written law of a Foreign country may be proved by the oral evidence of professional men.

Vide VanderDonckt v. Thelluson, 8 C. B. 812, where a person not a lawyer but a broker was permitted to give evidence of Foreign law relating to Bills of Exchange.

Rule discharged.

YOUNG *v.* YOUNG.

Hilary Term, 1854.

Witness remaining in Court after order to withdraw—It is in discretion of a Judge to allow him afterwards to be examined.

The only point in this case on which I had any doubt, was whether the defendant was properly rejected as a witness.

At the commencement of the cause on motion of the plaintiff's Counsel, all the witnesses were ordered to withdraw. The defendant, however, remained in Court, and at the close of the evidence was tendered as a witness.

I refused to admit him on two grounds. First, because I was under the impression, that it had been decided that a party to the cause who intended to give evidence must not be in Court when the other witnesses are examined, but I have not been able to find the case, and I am probably mistaken on this point.

Secondly, I rejected him because he had remained in Court

after the witnesses had been ordered to withdraw.

It is contended by the plaintiff's Counsel that the Judge has no power to reject a witness on that ground, but only to punish him for contempt for disobeying the order, and the *dictum* of Lord *Campbell* in *Cobbett v. Hudson*, 17 Jur. 488 is relied on.

As the power of the Court to adopt the most effectual mode of compelling the separate examination of witnesses, is thus called in question, it will be well shortly to review some of the authorities on which this power has been supposed to rest.

In *Rex v. Webb* cited in the note to *Beamon v. Ellice*, 4 C. & P., 588, *Best*, Chief Justice, rejected the witness "*though he was the Attorney in the cause.*

In *Parker v. Mc William*, 6 Bing. 684, *Tindal* C. J. says, "the rule with respect to the rejection of the testimony of witnesses who have remained in Court after an order for their exclusion has obtained in the Court of Exchequer for many years, and is universally known there. It was established in favor of the subject, and with a view to the fairness of proceedings chiefly at the instance of the Crown. But no such inflexible rule or practice has been established in the other Courts; and where an order has been made for the exclusion of witnesses, if it be disobeyed by any one of them, it must rest with the Judge to ascertain whether he remained by accident, or purposed to evade the order." And the other three Judges *Park*, *Gaselee*, and *Bosanquet*, in giving their opinions all say expressly, "that the admission of a witness who has remained in Court notwithstanding an order for retiring, must depend under all the circumstances of the case on the discretion of the Judge who presides at the trial."

In *Cook v. Nethercote*, 6 C. & P., 741, where a witness was objected to on this ground, *Alderson* B. observes, "that would be no ground for rejecting his evidence. It would only be matter of observation respecting his testimony. In one case the Judges granted a new trial, because a witness's evidence had been rejected by reason of his having remained in Court after an order for witnesses to withdraw." But in the note it is said that the case to which the learned Baron referred was nowhere in print, and it is further to be observed, that in the *exercise of his discretion* the Judge may not have seen fit to reject the witness, though his language as reported would seem to go beyond that.

But in the subsequent case of *Thomas v. David*, 7 C. & P., 350, on a similar objection being made, *Coleridge* J. says, "the rule you refer to in the Court of Exchequer is confined to revenue cases; in other cases, the rule there is the same as in the other Courts, namely, *that the rejection of the evidence is entirely in the discretion of the Judge*; and that being so, I think that under the particular circumstances of this case I shall be exercising a sound discretion in receiving the evidence."

In the recent case of *Cobbett v. Hudson*, Lord *Campbell* observes, "with respect to ordering the witnesses out of Court although it is clearly within the power of the Judge and he may fine a witness for disobeying this order, the better opinion *seems* to have been, that his power is limited to the infliction of the fine, and that he cannot lawfully refuse to permit the examination of the witness," and he cites the cases of *Cook v. Nethercote*; *Thomas v. David*; and *Rex v. Colley & Sweet*, M. & M. 330, (in which last case *Littledale* after consulting with *Gaselee*, laid down the same doctrine that it depends on the circumstances of the case whether to receive or reject the witness.) Upon this case it is to be observed that it was not necessary, and the language of Lord *Campbell* shows that he did not intend to give any decided opinion on the point.

Archbold 378; *Roscoe* 126; and *Starkie* 189, all authors of acknowledged authority though they cite the same cases, expressly lay it down that the admission or rejection is entirely a matter in the discretion of the Judge. The language of Mr. *Starkie* is very decided, he says, "for the purpose of furthering the object of cross examination, the Court will in general, at the instance of either party, direct that the witnesses should be examined each separately apart from the hearing of the rest. A strong test to try the consistency of their account."

"Where a witness remains in Court after an order for their exclusion, the rejection or admission of his testimony is a question for the discretion of the Judge under the circumstances of the case."

The weight of authority seems decidedly in favor of the Courts possessing this power which has been heretofore always acted on, and which appears to me in many cases indispensable to the correct administration of Justice, and I think we should require something far stronger than the *dictum*, much less the

more *semble* of a single Judge, before we can consider those authorities and this practice overruled.

With respect to the propriety of rejecting the defendant in the present case, where a party intends to become a witness he must, at least, be subject to all the rules applicable to other witnesses. The contest at the trial turned on two points. First, as to a system of annoyance offered by the defendant to the plaintiff, which compelled her to quit his house.

Second, respecting the 8 bushels of oats, part of the plaintiff's share in 1852, alleged to have been retained by the defendant. On both these points the plaintiff gave evidence, and parts of her story were contradicted by other witnesses. The defendant having heard all the evidence might easily shape his statement, so as not to contradict those parts that were corroborated by other witnesses, and flatly contradict the plaintiff where she was not; whereas, had he been out of Court he could scarcely have materially deviated from the truth without clashing not only with the plaintiff's statements, but with the testimony of some of the other witnesses. It appeared to me, therefore, that the receiving of his testimony, when it was offered, would, under all the circumstances of the case, been allowing him a very unfair advantage, and as the consideration I have since given confirms me in the opinion that I was right in rejecting him, I think the rule should be refused.

M'INNIS v. M'CALLUM.

Hilary Term, 1854.

Illegitimate children—Action by mother of—The 15 *Vic.* c. 23, only applies to women who have a parent, guardian, or master, who might maintain the action.

This was an action brought under the Act 15 *Vic.* c. 23, for seducing the plaintiff and getting her with child.

The plaintiff gave evidence that she had a child by the defendant, but no evidence was offered to shew that at the time the connection took place, she had any "parent, guardian, or master," who might have maintained an action, and the question now raised is, whether such evidence was necessary.

By the 1 Sec. it is provided that the female may bring an action in her own name (if she so elect), and that, notwith-

standing, she shall be the plaintiff in the cause, shall be admitted as an evidence therein for all such purposes as she could have been before the passing of the Act in case the action had been brought "*per quod servitium amisit*," by her parent, guardian, or master. The words of this section appear clearly to comprehend only those cases where the parent guardian, or master might have sued at Common Law. If it had been intended to give a right of action to every woman against the father of her illegitimate child, the Legislature would not have used the words, ("if she shall so elect,") as in that case many actions might be maintained where no one could sue at Common Law, and where, therefore, the woman could exercise no election in the matter. Again, the last part of the section expressly makes her a witness *only* in cases where before the passing of the Act an action might have been brought in the name of her parent, guardian, or master.

It was urged by the defendant's Counsel that the second section providing that it shall not be necessary to prove any pecuniary loss or damage, and that "the evidence of the plaintiff shall not be deemed to give her a right to any certain amount of damages," shews the intention to include every case where women have had illegitimate children. But I think no such intention can be inferred from that section. It is not very easy to understand what is meant by the words "Provided always, that the evidence of the said plaintiff so to be admitted in such cause shall not be deemed or construed to give her a right to any certain amount of damages whatsoever." If they mean anything it is merely that the Jury need not give credit to her unless they see fit. But it goes on to say that the "amount of damages shall be wholly, as heretofore, in the discretion of the Jury." And the substance of the second section is merely that the Jury, in assessing damages, shall be guided by the same principles as before the passing of the Act. But whatever intention may be ingeniously inferred from the language of the second section, it is the duty of the Court to collect the intention of the Legislature by construing the words it has used according to reason and the ordinary rules of grammatical construction, and where the words of one section are plain, we cannot wander over other sections to spell out an intention, either limiting or excluding their meaning.

I think this Rule should, therefore be made absolute.

ROBINSON, APPLT. v. M'QUAID & OTHERS.

Hilary Term, 1854.

Board of Education—order locating school-house under 15 *Vic.* Cap. 13, valid until quashed though house within three miles of another—Requisition must be in writing and addressed to Board established under the Act.

This was an appeal from a conviction of a Justice of the Peace for a school rate, under the 15 *Vic.* c. 13, and several important questions on the construction of the Act are raised.

First, it is contended that the school-house for which the rate was made, being within the distance of three miles of another registered school, the Board of Education had no power to establish it, and that, consequently, the rate is void.

As to this point, there can be no doubt, that under the provisions of the 25th section, the Board of Education cannot legally locate a school-house within three miles of one already established under the Act.

But it is contended by the respondent's Counsel that the decision of the Board of Education on this point (until reversed on *certiorari*) is final and conclusive, and that no evidence can be heard to contradict it, by shewing that the school-house is within three miles of another established school. It is a well established principle of law, that where a tribunal having power to adjudicate on a particular subject matter does adjudicate thereon, evidence is inadmissable in any collateral proceeding, to shew that the adjudication is erroneous; but where there is a total want of jurisdiction, evidence is there admissable, to shew that the tribunal had no power to adjudicate on the subject matter. Thus, "if one be rated to the poor who is neither an inhabitant nor occupier of land within the parish, and his goods be distrained for the rate, he may maintain an action against the person levying." See *Fawcett v. Fowlis*, 7 B. & C. 394; and *Weaver v. Price*, 3 B. & Ad. 409. On the argument, the present case seemed to me to fall within the principle of the latter class of cases, but on a careful consideration of the duties of the Board of Education, under the Act, it seems impossible to distinguish it from those cases in which the adjudication has been held incontrovertible.

In *Brittain v. Kinnaird*, B. & B. 432, in trespass for distraining a vessel, it was held that a conviction under the Bomb-boat Act was conclusive evidence that the vessel was a boat within the meaning of the Act, and properly condemned,

and evidence to shew that she was not a boat was rejected, and on the Counsel suggesting that on the same principle the Magistrate might condemn a "seventy-four" and call it a boat, the Court said, even in that case, until the conviction was quashed, it would be conclusive.

So in *Gray v. Cookson*, 16 East, 13, a Magistrate having made an order as against an apprentice, it was held that evidence of a previous dissolution of the apprenticeship (which if admitted, would have shewn a want of jurisdiction in the Magistrate,) was rightly rejected.

The principle on which these cases and numerous others of a similar class were decided, was, that the Magistrate had a general jurisdiction over the subject matter in dispute, and had, therefore, to enter on the inquiry, as to the particular fact attempted to be controverted, (viz, in the first case, whether the vessel seized was a boat, and in the second, whether the party was still an apprentice,) and that it was for him to decide as to the truth of these facts, and, however erroneous the conclusion he found on those facts might be, until quashed on appeal, or *certiorari*, it was conclusive. The fifteenth section of the Act confers a general power on the Board of Education to choose and define school districts, and to determine the sites of school-houses; but by the twenty fifth section it is restricted from locating a school-house within three miles of one previously established under the Act. In order to perform the general duty imposed on it, the Board must, amongst other inquiries, ascertain the fact, whether the proposed site of a new school-house is within three miles of another, and having (as in this case), determined that it is not, however erroneous and contrary to the truth that decision may be, on the principle of the cases I have already alluded to, it is conclusive in collateral proceedings such as this, and we cannot receive evidence to contradict it.

Thirdly, it is objected that the proceeding of the Board is void on its face.

By the fifteenth section it is provided "that as often as the inhabitants of any settlement shall desire the erection of a new school district, five of such inhabitants shall make request in writing, notifying such their desire to the said Board of Education," then "the Board shall proceed as pointed out in the Act." Unless such requisition be made to the Board it has no power *to* act at all. It was, therefore, necessary for the

respondent to prove a requisition. Now the requisition proved in this case is dated January 1853, whereas the Act did not come into operation until April, following, and it is contended that this can be no requisition to the Board constituted under this Act; that it is, in fact, addressed to the old Board of Education, an entirely different body, who had no such powers as those possessed by the present Board. To this it is answered that the requisition was, evidently, intended for this present Board, and that it has been recognized by some of the parties to it since it came into the possession of the new Board. From the evidence of Mr. *Cundall*, it appears that he was Secretary to the old Board, and that he also fills the same office to the new one, and the requisition was handed over to the new Board, or rather, remained in his possession with the other papers. Now the Act requires a request to the Board appointed under it. That this requisition was not addressed to that Board is certain, because, at the time of its being made and delivered to the Body to whom it was addressed by the requisitionists, the present Board was not in existence. Suppose, instead of being addressed to the Board of Education, it had been addressed to the Governor in Council, or to some individual, and that it afterwards found its way into the hands of the present Board of Education, would that have been a requisition on which valid proceedings could have been founded by the Board? I think not, because it would not be in the terms of the Act, "a request in writing notifying their desire *to the said Board of Education*,"—that is, the Board mentioned in the Act. There is no magic in the term Board of Education, though the body to whom this requisition is addressed happen to be so designated, that cannot make these proceedings valid, unless a requisition addressed to the Governor in Council, or an individual who had no authority in the matter, being handed to the Board, would have done so.

As to the argument, that the requisitionists had acquiesced, or assented to the new Board treating this requisition as addressed to it, it is not necessary to decide whether it could have been rendered valid by such means, because there is no evidence to shew that all the five parties to it did acquiesce, or assent to it, and even if they had, that acquiesence or assent consisted of conduct, demeanour, and oral applications to, or conversations with the Board, or its Secretary. If these were admitted to support the requisition, it seems to me it would

not then be a requisition "in writing," which the Act expressly requires. And where an Act requires a proceeding to be in writing, we have no power to allow an oral one to be substituted for it. In all proceedings of this kind, the particular mode of proceeding pointed out by the Act, must be followed; if we once depart from it, it would be difficult to know where to draw the line. I think, therefore, that the requisition in this case was not such a requisition to the Board of Education as the Act requires, and consequently, that all the proceedings of the Board founded on it are void.

The decision on this point renders it unnecessary to decide whether the action should have been brought before the Commissioners Court. But on reading the whole of the 32nd Section it is evidently the intention to give Justices of the Peace a concurrent jurisdiction with the Commissioners Court.

The Judgment below must be reversed.

DOE DEM TULLIDGE *v.* ORR.

Hilary Term, 1855.

Statute of Limitations—of possession—death abroad after many years absence without receipt of any rents and profits not necessarily a discontinuance of possession—the return of owner who was under disability at passing of Act and who has sold while under such disability--does not determine the disability.

In this case it appeared that Capt. *Wm. Winter* was possessed in fee of the *locus in quo*, called the Retreat farm, on Lot 23, and on which he resided from 1792 until the Autumn of 1805 when he left the Island, leaving his wife and *Robert Winter* their son (through whom the lessor of the plaintiff claims) in possession. The wife left the Island about two years afterwards, *Robert Winter* continuing in possession; Capt. *Winter* never returned to the Island. By Indentures dated 14th July 1792, Capt *Winter* had mortgaged Lot 23' including the Retreat farm, to *William* and *Jacob Kirkman*, residents of *England*, and by Deed dated 3rd May 1806, he released the Equity of Redemption to the Mortgagees, who, by Indentures dated 5th July 1810, conveyed the premises to *David Rennie*, who died in January 1823, never having been on the Island, whereupon the Township descended to his sons *Robert Rennie* and *David S. Rennie*. In 1840, or 1841, the

Township was divided and the Retreat farm fell to the share of *David S. Rennie*. *David S. Rennie* first came to the Island in 1839. In 1842 *David S. Rennie* conveyed the *locus in quo* to the defendant. It appeared that for some time previous to 1842 *Robert Winter* had been weak in his intellect, and made little use of the cleared land on the farm, and that defendant, on getting his deed, entered into possession and cultivated the largest part of the cleared land. *Robert Winter*, however, continued to reside in the house until about 4 months before his death, when he removed to a neighbor's house, where he died in March 1847, and the defendant has ever since been in possession of the whole farm. The lessor of the plaintiff is the sister of *Robert*, and now seeks to recover the premises on the ground that *Robert Winter* acquired a Statutable title by possession previous to his death.

The first question to be decided is, at what time the Statute began to run. The third section of the Statute 7 *Wm.* 4 Cap. 9, which fixes the period at which the right "to make an entry or bring an action shall be considered as first accruing," provides that "when the person claiming such land, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession, or in receipt of the profits of such land, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession, or receipt, then such right shall be deemed to have first accrued at the time of such dispossession, or discontinuance of possession." There is no evidence to shew that the son or wife, on Capt. *Winter's* leaving the Island, held adversely to him. Capt. *Winter* was not, therefore, dispossessed. Did he discontinue the possession? The facts are that he left the Island in 1805 leaving his son and wife in possession. Was that act a discontinuance of possession? If so, then every one who leaves the Island for a few months, leaving his family in his house, must, under this Act, be considered as having discontinued his possession. But no such legal consequence follows. In such case the possession of the wife, or son, or other person left in charge is the possession of the owner. The fact of Capt. *Winter's* leaving the Island in 1805 leaving his wife and son in possession is no evidence of a discontinuance of possession on his part. Undoubtedly the subsequent conduct of the owner, such as declarations of his intention in leaving, long continued neglect of the property, as in *Corbyn;*

v. Bramston; or other circumstances might afford evidence to shew an intention of abandonment or discontinuance of possession at a period when, but for such declarations or conduct, the owner's relations, with the person left in charge, would rebut the presumption of any such intention. But no such evidence appears in this case, on the contrary, in July 1806, about 7 or 8 months after leaving the Island, he conveys the property to his creditor, to whom it had been previously mortgaged. I think, therefore, that up to July 1806, Capt. *Winter* must be considered in possession, and that the Statute had not, up to that period, commenced to run.

The third section also provides that "when the person claiming such land shall claim in respect of an estate, or interest in possession granted or assumed by any instrument (other than a will) to him, or some person through whom he claims, by a person being, in respect of the same estate, or interest, in the possession or receipt of the profits of the land, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which such person, claiming as aforesaid, or the person through whom he claims, became entitled to such possession, or receipt, by virtue of such instrument." On the 3rd of May, 1806, *William* and *Jacob Kirkman* became entitled by the deed from Capt. *William Winter*, to the possession, and at that time, therefore, under the express words of the third section the Statute began to run.

It was urged on the argument that there was no evidence to shew that *Kirkmans* continued under the disability of absence to the expiration of the forty years, or I presume, to within ten years prior to that period.

The thirteenth Section provides that a person under disability of absence shall have ten years to bring his action after the disability ceases. The Statute, evidently, intends that the removal of the disability shall be by such persons returning and barring (in the words of the second section) the right to make an entry or bring an action, but, if during that absence he has parted with his estate, his return cannot, it appears to me, remove the disability, because he does not come clothed with the power contemplated by the Statute, *viz*: the right of entering or bringing an action. It is quite true that the disability is personal, that is, that a party against whom it has

began to run cannot by subsequent conveyance transfer the disability so as to make its continuance depend on the acts of other parties. This was decided in *Stackpole v. Stackpole*, 3 Warren & Drury 320. But if by conveying his estate it has become impossible to return clothed with the right to make an entry or bring action, the disability is not transferred to others, but is merely, by the circumstances which have happened, prevented from being removed by the party's return, and must continue until the other event pointed out by the Statute for determining it, *viz*: the death of the person to whom the disability of absence first attached happens. And there being no evidence to shew that *Kirkmans* are dead the presumption of law is, that they are still alive. But it is unnecessary to decide this point as I think there was sufficient *prima facie* evidence to shew that the *Kirkmans* continued absent. The degree of evidence necessary to shew that the person continued absent must depend on circumstances. If a person be a resident of this country, the shewing him absent at a particular time would be no evidence that he continued absent, because the natural presumption is, that he would return to his home, but where, as in this case, it appears that the party is a resident in another country, the presumption (in the absence of any evidence to the contrary) is, that he remained at home, and had the case been put to the Jury, on that point, they would, no doubt, have found for the defendant.

Sir E. *Sugden*, in his treatise of *Real Property Statutes* page 35, says, "Although when the time has once begun to run the party to be affected cannot by any settlement create new rights, yet, persons so claiming under him will have the same time to bring an Ejectment as he himself would have had if he had continued alive and remained owner of the estate."

The Statute in the present case began to run against the *Kirkmans* in May 1806, and as they continued absent, and must be presumed alive, they, or those claiming under them, would not be barred until the expiration of forty years *viz*., in May 1846, and until that period the persons in adverse possession could acquire no title. But in this case the defendant claiming under *Kirkmans* enters into possession in 1842, *Robert Winter*, therefore, never acquired any Statutable title, and, consequently, had no Estate which could descend to the lessor of the plaintiff. It is true there was evidence to shew that *Robert Winter* occupied the old house up to 1847, but

whatever effect that might have as to the house itself, or the spot on which it was situate, cannot defeat the right of the defendant who claims under a good documentary title to the rest of the farm of which he had possession in May 1846.

The Rule for a New Trial must be absolute.

M'KINNON v. M'KINLEY.

Hilary Term, 1856.

Distress—Bailiff may use force necessary to ascertain if door is fastened.

The distress was made in a barn. The door was fastened inside with two pins. Defendant put his hand against it to try if it was fast, and it fell in. The ordinary way of opening it was by going on the inside and taking out the pin and lifting the door out. The *Chief Justice* told the Jury (in an action of Trespass against defendant) that if the door fell in by defendant's pressure, however slight, it was a trespass.

Held wrong. That direction should have been, that if defendant used no more force than was necessary to try if the door was fastened, and in consequence of that, from its insecure fastening, it fell in, it was no trespass.

New Trial granted.

THE ATTORNEY GENERAL v. WESTAWAY.

Hilary Term, 1856.

Road Compensation—On information against owner of land for preventing opening of new road laid out by Commissioners under 14 *Vic.* Cap. 1, sec. 14, being opened, it must be alleged that it ran through defendant's land.

This was an information by the *Atty. General* against the defendant for preventing the opening of a road directed to be laid out by the Governor and Council under the 14 *Vic.* Cap. 1, sec. 11. To which there is a general demurrer.

The information alleges that the Governor did order the opening of a certain line of road, leading from the Main Road at Aitken's Township 59, to the road leading from *St. Andrew's Point* toward *Murray Harbor*. It then sets out the appoint-

ment of Commissioners as directed by the Act, to appraise the damage to the persons through whose land the road runs, and the return of the Commissioners awarding £15 to the defendant. But there is no allegation in the information that the road directed by the Governor to be laid out, and which the Commissioners were appointed to examine ran through the defendant's land, and I think the want of such allegation is false to the information. It is true the return of the Commissioners states that they have examined the advantage or disadvantage to owners over whose land the road runs, but this part of the information is a mere recital of their return, necessary only as shewing that the directions of the Statute, as to appraisement, have been complied with. The defendant might have traversed the return, but by the rules of pleading no issue can be taken on a mere recital, or statement contained in a document recited, and therefore the return or any statement in it cannot supply the place of a material and necessary allegation, and even if issue could be taken upon it, it is not an allegation that the road directed to be laid out by the Governor was the road the Commissioners examined, because the order of the Governor, as set out in the previous part of the information, only directs a road to be laid out from one existing road to another, without saying at what precise point of the existing road it is to start, or the course or courses it is to run until it reaches its *termini* at the other road. There is, therefore, nothing to direct the Commissioners to the precise line of road intended to be laid out, and *non constat* from anything that appears in this information they may have examined quite a different line of road from that the Governor intended to be laid out. I do not mean to say that it was necessary to set out the starting point and the courses of the road. Such particularity is not necessary in pleading. The allegation in the information, that a certain road, in such a parish, leading from one existing road to another, is sufficiently certain in that respect. But there must, also, be a substantial allegation that such road ran over the defendant's land. The defendant could then traverse the fact that the road ran over his land, and evidence of the place of commencement, and the course of the road would enable a Jury to determine the issue. But if this information were held good, the Commissioners might examnie a different line of road from what the Governor intended, and

the defendant could take no traverse which would raise an issue as to the fact.

There must, therefore, be Judgment for the defendant.

DOE DEM YEO *v.* BETTS.

Easter Term, 1856.

Land Tax Sale under 11 *Vic.* Cap. 7,—Want of Notice of sale cured by the 22 Sec—Sheriff's deed void if lands not described by metes and bounds at time of sale.

This was an action of Ejectment brought to recover lands sold by the Sheriff under 11 *Vic.* Cap 7, for non-payment of land tax, and two questions were raised.

First, it is contended that the plaintiff was bound to prove that the Notices of Sale required by the Act had been duly given by the Sheriff. Second, that it appeared that the land was not described at the sale by metes and bounds as directed by the 7 sec. of the Act.

For the plaintiff it was contended that the provision respecting notice is merely directory, and that, if not, the want of notice is cured by the 22 sec., and that even if it were not, in the absence of any evidence to the contrary, it will be presumed that the Sheriff acted rightly and gave due notice.

In *Rex v. Lonsdale*, 1 Burr. 448, Lord *Mansfield* says, "there is a known distinction between circumstances which are of the essence of a thing required to be done by an Act of Parliament, and chances merely directory. The precise time in many cases is not of the essence, while no one ever thought that the number of overseers was directory."

In *Doe d. Phillips v. Evans*, 1 C. & M. 456, the Insolvent Act, 1 *Geo.* 4, Cap. 117, sec. 7, directed that the general assignee should sell any real estate of the Insolvent within two months after the assignment by public auction, in such manner, and at such place, as the major part of the creditors of the Insolvent who should assemble together on any notice in writing, published in the *London Gazette*, should under his, her, or their hands approve. In Ejectment on a conveyance from an Assignee made two years after the assignment, and no proof of a compliance with the provisions of the Act the notice and meeting of creditors &c, 30 days before the se

the provisions were held merely directory, and the plaintiff recovered.

In that case the essence of the thing to be done was the sale and conveyance of the property, the preliminary notices and meetings were only collateral matters. It must, however, be remarked that the legal estate in that case was vested in the Assignee by virtue of the assignment from the Insolvent, and the assignee did not, therefore, convey under a statutable power.

In *Perry v. Bowes*, Ventris 360, and *Elliot v. Danby*, 12 Nod. Rep. 3, a lease from Commissioners of a Bankrupt was held not to pass the estate until the enrolment required by the Statute, because the Commissioners had not the legal estate, but only executed a power given them by the Statute, and must, therefore, execute it with all the circumstances required; and this distinction is alluded to in *Doe d. Phillips v. Evans*, where, on the Counsel observing that the enrolment in those cases did not go to the essence of the thing, *Bailey* B. observed, "that was a *Statutable* conveyance not allowed by the common law. The whole estate is here vested in the assignee, he is not a mere conduit pipe," and again, "this is not the mere exercise of a power. The exercise of a power is where I have a right to appoint over your property. If I have the legal estate I do not exercise a power."

In *Rex v. Haslingfield*, 2 M. & S. 55, and *Doe d. Nanney v. Gore*, 2 M. & W. 32, which arose under *English* inclosure Acts, the Commissioners acted under a Statutable power, and the provisions of the Act with respect to notices was held imperative.

In the case of sales of land by a Sheriff, Chancellor *Kent* says, "the deed connected with the sale operates by way of execution of a Statutable power," 4 *Kent* Com. 431. And the same doctrine *viz.*, that a Sheriff has no estate, but acts under a power (though not Statutable) prevails in *England* on sales of leasehold interests in land under a *Fi. Fa.*, *Doe d. Hughes v. Jones*, 6 Jur. 302.

By analogy to the rule which prevails in the execution of powers contained in Indentures, it would seem that where a Statute, giving a power to sell and convey land, requires notice, it must always be held imperative. In *Sugden* on Powers 267, it is laid down, "if notice is required to be given the execution of the power will be void if notice be not given

accordingly. So in every case that the sagacity of man can devise the terms of the power must be complied with."

In *Rex v. Croke*, *Cowper* 26, where a Statute empowered Commissioners to take land for a road, and it was, amongst other things, objected that the required preliminary notices had not been given, Lord *Mansfield* says, "this is a special authority delegated by Act of Parliament to particular persons to take away a man's estate against his will, therefore, it must be strictly pursued."

The impression has, I believe, been, that the provisions respecting notices in Statutes empowering Sheriffs to sell lands, are not directory, but imperative, and which seems recognized by the Legislature, as by 7 *Wm.* 4, Cap. 4, the *onus* of proving want of notice is thrown on the party impeaching the Sheriff's deed, and that the same strictness of proof was deemed necessary under similar Acts in *New Brunswick* appears from the Judgment of *Parker* J. in *Linton v. Wilson*, 1 Kerr's Rep. 243, who in speaking of an Act similar to our own Act of 7 *Wm.* 4, Cap. 4, says, "The necessity of proving certain acts which the law made requisite to a Sheriff's sale was a mischief to be remedied." And what did this arise from? The difficulty of procuring *viva voce* testimony of the person who did the acts. Still it may be doubtful whether the rule laid down by Lord *Mansfield* in *Rex v. Lonsdale*, *viz.*, that unless the thing to be done is of the essence the provision is directory, is not equally applicable to all conveyances made under the directions of Statutes, whether the party making them has (as in the case of Insolvent assignees) the legal estate or acts simply as the donee of a Statutable power. In *Pearse v. Morrice*, 2 A. & Ell. 96 *Taunton*, says "the distinction between directory and imperative Statutes has been long known. An early instance in which it was taken was *Rex v. Sparrow*, 2 Strange. I understand the distinction to be, that a clause is directory where the provisions contain mere matter of direction and nothing more; but not so where they are followed by such words as are used here, *viz.*, that anything done contrary to such provisions shall be null and void to all intents." The legal estate in this was in the trustees, but the language of the Judge seems to apply to all cases where negative words are not used. And *Dwarris*, in his treatise on Statutes, seems to put both classes of cases on the same footing. And in *Doe d. Roberts v. Moyston*, 11 Com. Law Rep. 505

(17 Jur. Dig. 39) where an inclosure act directed that the award should be made within six years, an award made after that time was held good. *Creswell* J. says, "this Statute is not like the case of an ordinary submission to arbitration, with a proviso that the award shall be made within a certain time. The Act directs certain lands to be inclosed, and certain persons are to be appointed Commissioners to make allotments. When the clause follows enacting that an award shall be made within a certain time, I think this clause is directory only."

It is not, however, necessary to decide the point in the present case, as we think the want of notice is cured by the 22 sec. which enacts, "that no omission of any direction contained in this Act, relative to notices or forms of proceeding previous to any sale, shall extend to render such sale invalid, but the person guilty of such omission or neglect shall be liable to punishment therefor, and shall answer the party injured &c." It was urged by defendant's Counsel that this does not extend to a case where no notice of sale had been given, but only to cases of defective notice, but it is impossible so to narrow the plain words of the Act. A notice of 20 days previous to the sale would be defective. If the section would cure such a notice, so it would a notice of one day, and if so, why not entire want of notice?

As to the second point, the 7 Sec. enacts, "that the Sheriff, or Coroner before proceeding to sell such lands shall ascertain, and *at the sale* publicly declare *the metes and bounds thereof*, as particularly as the same can, or may be described, and shall make and execute to such purchaser a conveyance thereof." It was urged that this provision was directory also, but this describing at the sale the land he is selling is clearly of the essence of the thing the Sheriff is directed to do, *viz.*, to sell the land, and it is the deed as connected with the sale which operates to pass the title to the purchaser; without such sale, therefore, no title passes by the Sheriff's deed, and if the land sold was, when the hammer fell, uncertain, how is it possible to say that the land described in the deed, afterwards given, was the identical piece of land sold, and if it was not, then the land described in the deed never having been sold, cannot pass by the deed. The provisions of the 11 sec. (which were not adverted to on the argument) also show that this provision was intended to be imperative. By that section the Sheriff in selecting the quantity of the defaulter's land to be sold, is

required to have regard to the buildings and improvements of such defaulter, which he is not to sell if there is sufficient land remaining to realize the levy and expenses. Now if the precise lands are not known and pointed out at the sale, how could the owner, if present, or any bidder know whether the buildings and improvements were selling or not? The former under the impression that his buildings and improvements were safe, might allow the land to be knocked down at a small sum, and, afterwards (if the description given at the sale could at all be departed from) a slight variation in the deed of a course or distance might include buildings and improvements worth hundreds of pounds, and which is in fact argued to have been the case in the present instance, the plaintiff having bought the land for £4, 1s. 0d., and now claiming the defendant's mill and improvements which must be worth a very much larger sum.

It is further argued that even if the section is imperative the maxim "*omnia rite esse acta*" applies, and that it must be presumed that the sale was properly conducted. In *Williams v. The East India Company*, 3 East 199, Lord *Ellenborough* says, "That the rule of law is. that where any act is required to be done on the one part, so that the party neglecting it would be guilty of a criminal neglect of duty in not having done it, the law presumes the affirmative and throws the burden of proving the contrary, that is, in such case, of proving a negative on the other side." In *Doe dem Nanney v. Gore* 2 M. & W. 32, the notices under the Insolvent Act were presumed. So in *Doe d. Milburn v. Edgar*, 3 B. & C. 393 the notices under the Insolvent Act were presumed. So in *Manning v. Eastern Counties Railway Co.*, 12 M. & W. 237, (8 Jur. Dig. 45,) where an inclosure Act authorized the Commissioners to stop up a road with a proviso that no road should be stopped without the order of two Justices of the Peace, it was held that the award and the recital of the order was sufficient *prima facie* evidence that the road was stopped by order of the Justices. Mr. *Starkie*, page 635, lays down the rule, "that upon proof of title everything which is collateral to the title will be intended, without proof, for, although the law requires exactness in the derivation of a title, yet when that has once been proved, all collateral circumstances will be presumed in form of the right."

In *Fenwick v. Floyd* cited *Tingl. Adams*, Ejectment 301

(N. 1) it is said, "in an action of Ejectment by a purchaser under a Sheriff's sale against a debtor who refuses to give up the possession of the land, it is incumbent on the plaintiff to produce the Judgment and the *Fi, Fa.*, and to prove the sale, which may be done either by the deed from the Sheriff or a return of the *Fi, Fa*, they are sufficient to entitle him to recover."

It would be attended with the greatest inconvenience, if it were necessary in order to make out a title to lands under a Sheriff's deed, to prove that all collateral matters required by the Act respecting the sale had been complied with. Such a title would not only be always doubtful, but would become insecure as it grew older, since, though it might not be difficult to prove what the Sheriff declared, or did at a sale twelve months ago, it might be very difficult to prove what was declared or done at a sale which had taken place 18 or 20 years ago. It appears to us that in all cases depending on titles of this kind, where the action is brought recently after the sale, or where the purchaser is in possession, and there are no circumstances to rebut the presumption, the maxim "*omnia rite esse acta*" applies. In the present case the plaintiff's title was derived from the Judgment *Fi, Fa.*, and sale, which last being proved by the deed, the mode of conducting it, and the particular circumstances attending it (however necessary to its validity) were merely collateral matters, which under the authorities referred to would be presumed to have been rightly done. But this is merely a presumption, and where, as in this case the matter is essential, negative evidence may contradict it by showing positively that the thing presumed was not done, or circumstances may raise a contrary presumption and thereby throw the *onus* of proving that it was rightly done back on the party in whose favor the presumption would otherwise have been made. Thus in *Rex v. Haslingfield*, 2 M. & S. 558, where an inclosure Act gave Commissioners power to set out boundaries of parishes and ascertain the parochial locality of roads giving certain preliminary notices to the parishes interested. It being shown that the *Parish of Haslingfield* had continued to repair for 16 or 17 years was held to do away with the presumption that all had been rightly performed, and to raise a presumption that the notices had not been given according to

the Act, because if that were so, *Haslingfield* ought not to have, continued to repair.

So in *The King v. Inhabitants of Washbrook*, 4 B. & C. 735, the description of the boundaries inserted by Inclosure Commissioners in the newspapers differing from the description in the award, proved that they had not followed the requisites of the Act, and, therefore, had not pursued their power, and consequently, the award was held void.

In the present case the plaintiff called the Deputy Sheriff to prove that he sold the land conveyed by the deed. In one part of his testimony he states that he sold the identical piece of land mentioned in the deed, but in another part he says the locality was pointed out, and it is quite plain from the whole of his evidence that he did not declare the precise metes and bounds of the land he was selling, or give such a certain or particular description of it as would enable it to be distinguished from other lands by which it was surrounded. We do not mean to say that it is necessary that the precise courses and distances should be declared. That would be one proper way of doing it, but if the Sheriff declared that the land was bounded by certain known bounds, such, for instance, as bounded by such a road or river on the front, on one side by the land of A, and on the other by the land of B, and in the rear, by some other known; and established boundary, we think that would be sufficient, even, perhaps, though the exact quantity was not known, but where he merely declares the locality, or that it is part of such a piece or tract of land, without particularly describing what part, (which appears to have been what was really done here) that is clearly insufficient both under this section of the Act, and also, we think under the law as it stood before, of which this section seems to us only an affirmance.

Thus in *Fenny ex d. Masters v. Durrant*, 1 B. & Ald. 40, where the Sheriff's return to an Elegit stated that he had delivered an equal moiety of a house, the return was held void for not setting out the moiety by metes and bounds.

In a note to *Til. Adams*, on Ejectment 301, it is said "a Sheriff's return to a *Fi. Fa.*, which states a levy on part of a tract called &c, is void, for uncertainty cannot be set up by matter dehors the return, and a sale under it passes no title. But a levy on a tract called &c., under a *Fi. Fa.*, against a person who was seized of a part of such tract and a sale under it

will pass his interest to the purchaser."

It was urged by the defendant's Counsel that this defect was also cured by the 22 section, but that section only applies to proceedings *previous* to the sale, and can have no effect on what should be done at the sale. If it did, it would enable the Sheriff to evade the requisites of the 7th section and open a door to all the evil and unjust practices which existed under the old mode of selling and which the 7th section was intended to prevent.

We have considered this matter at greater length than was necessary for the decision of the case; but from the frequency of these sales and the increasing number of titles depending upon them, it seemed to us expedient that the construction of the Act, the duty of the Sheriff in conducting them, and the general principles of the law of evidence applicable to them should be considered somewhat at large.

The Rule must be absolute.

BOURKE v. MURPHY.

Trinity Term, 1856.

Public Wharf—power of Governor and Council to make regulations under 15 *Vic.* Cap. 34—cannot impose excessive rates on some boats or head money on passengers going by them —the term vessel does not comprehend boats.

This case comes up by *Certiorari* from the Mayor's Court, and is brought to test the validity of the seventh clause of an order of the Governor and Council, made on the 15th May, 1856, under the authority of the Act of 15 *Vic.* Cap. 34, respecting the wharf at *Minchin's Point* on the *Hillsborough River*.

By the twelfth section of the Act it is provided that "the Public wharf at *Minchin's Point* opposite *Charlottetown*, on the South side of the *Hillsborough River* shall be under the management and control of the Lieutenant Governor and Council, who shall have power to establish the rates of wharfage to be paid by *vessels* using the same, and to make such other rules and regulations for the management of the said wharf as he may think fit from time to time."

The seventh clause of the order provides that "any boat or

vessel employed or used by any person or persons except *Henry Pope Welsh*, the present licensed ferryman, or licensee of *Hillsborough* ferry opposite *Charlottetown*, or his successors therein, in systematically ferrying for, or without hire, passengers &c, over the said ferry, and landing *or taking off the same from* the said wharf, to pay the rate of one shilling for each and every passenger landed on or taken off the said wharf, and also, the rate of two shillings and sixpence for every time such boat or vessel shall touch at or land passengers on the said wharf, to be paid by the parties owning or employed in working such boat or vessel"

It appears that on the sixteenth of May a boat owned by the defendant, and used in ferrying passengers without hire, touched several times at the wharf, and that on the same day 60 passengers embarked from the wharf on board the boat. The defendant's Counsel contends:—

First, that under this Act the Governor and Council are only empowered to impose rates on *vessels* using the wharf, and that a boat cannot come under that description of craft, and that, therefore, the order is, in this respect, void.

Secondly, that the Act gives no power to impose a charge of head-money on the owner of a boat in respect of persons embarking from the wharf into such boat.

It was strongly contended by the *Attorney General* that on the purview of the whole of this Act, it must be considered the Legislature intended to establish this as a ferry wharf. The rule laid down by *Dwarris* page 581, is, "that in construing the words of an Act, and collecting from them the intentions of the Legislature the terms are always to be understood as having regard to the subject matter, for that, it is to be remembered, will always be in the eye of the framer of the law and all his expressions directed to that end." Now I agree with the *Attorney General* so far, that if this wharf, or any part of it was either by the Act, or otherwise, shewn to be held peculiarly for the purpose of the ferry, then the Act authorizing the Governor and Council to let and deal with the ferry, and also, to make rules and regulations for the management of the wharf so in whole or in part devoted to its use, must be considered to refer to rules and regulations applicable to a wharf used for that peculiar purpose, and would, therefore, empower the Governor and Council to make rules directly prohibiting any boats, or class of boats, from touching at the

wharf, or the part of it devoted to that purpose, or to make any other rules and regulations necessary to prevent the licensee of the ferry being interfered with. But with the exception of the title (which it is expressly laid down forms no part of an Act, and is without any legislative import, and to which, therefore, the Judges in construing an Act can pay no regard) there is nothing in the evidence, or in the Act to shew that this wharf, or any part of it is, or ever was devoted to this purpose. The preamble of the Act in speaking of the ferry, merely calls it "the ferry over the *Hillsborough River* opposite *Charlottetown* commonly called the *Charlottetown ferry*," but there is not one word from the beginning to the end of the Act to shew that the ferry should terminate at this particular wharf, or which could prevent the licensee of the ferry from selecting any other place opposite *Charlottetown* as the landing place, or to shew that the Legislature intended to devote it to the use of the ferry if the license chose to use it. The only thing from which it is argued such an intention can be presumed is, that the same Act which authorizes the Governor and Council to let the ferry and which points out the manner in which it shall be conducted, also places the management of this wharf under the control of the Governor and Council, but in doing so the Act expressly names it as "*the Public wharf at Minchin's Point*," and even if it were not so named, it would be going beyond all precedent to presume such an intention merely because provisions relating to subject matters having no necessary connexion with each other, are contained in the same Act. In determining this question, therefore, we must look on this wharf in the same light as any other *public* wharf in the Island.

Now where a wharf is erected as a public wharf, or is declared by Statute to be so, I understand it to become one of those public things the property of which belongs to the whole country, and the use of which is allowed to all the inhabitants of the country, in the way in which such things are ordinarily used, subject, of course, to such rules and regulations as are necessary to secure to all the enjoyment of that which is intended for the benefit of all, and that the persons or authorities intrusted with its general management and control have no power either directly by positive prohibition, or indirectly by the imposition of rates or burdens, to restrain any individual, or class of individuals from using it in the same way as

the public generally are permitted to do. Such abridgment of the subject's right or charge on him for exercising it must be illegal, unless the intention of the Legislature to authorize the imposing it be distinctly and expressly shewn. For in the language of *Bayley* J. in *Denn d. v. Diamond*, 4 B. & C. 245, and *Waterhouse v. Keen*, 4 B. & C. 209, "It is a well settled rule of law that every charge upon the subject must be impsoed by clear and unambiguous language, and that where there is any ambiguity in the language used the construction must be in favor of the public right." The language of this Act is, that the Governor and Council shall have power "to establish the rates of wharfage to be paid by vessels using the same, and to make such other rules and regulations for the management of the wharf as he may think fit from time to time." This is mere general language quite sufficient to empower the Governor and Council to levy equal rates and to make rules and regulations necessary for maintaining the wharf and reserving the proper and convenient use of it to all, but wholly insufficient (according to any authorities with which I am acquainted) to authorize an abridgment of any individual's right to use it, either by express prohibition, or by establishing exceptional rates against him.

It is, however, unnecessary to rest the decision in the present case on such general principles. "It is a rule in the construction of Statutes that "one law shall be compared with other laws made by the same Legislature *upon the same subject, or relating expressly to the same point, enjoined for the same reason, and attended with the like advantages;*" *Dwarris* 509. Now by referring to other Acts relating to other public wharfs in this Island, it will be seen that they all contemplate their being used by the public generally. Thus the 12 *Vic.* cap. 13, relating to the wharves in *Charlottetown*, after fixing the rates and duties payable for their support &c, contains such rules and regulations for their management as will secure the convenient use of them to the public generally without exception; and the 7 *Vic.* Cap. 15, relating to the *Georgetown* and other public wharves, contains provisions having a similar object. Now where an Act is passed relating to another public wharf, placing it under the control of any public body with power to make rules and regulations for its management, it must be inferred that the Legislature intended those rules should be of a character to secure its use and convenience to

every member of the public without exception of individuals or classes, because such is the object which all other Statutes on similar subjects, evidently have in view. Local circumstances may render it necessary that the regulations should vary in their details from those generally adopted, but in making them the common object of permitting every member of the public to use it must be kept in view, and where that is departed from, the power is exceeded. More stringent and particular regulations (and those frequently varied) may be necessary to provide for the public enjoyment of a wharf in or near a City than in a less populous district. It may be found convenient that a ferry boat should land its passengers on it, or that a packet boat should have a berth always ready to receive her; and a regulation directing a certain part of the wharf to be kept clear for the use of such ferry boat, or packet, though different from any contained in Acts on similar subjects would be perfectly legal, its object being public convenience and the restriction in the use of a particular part applying to all for the benefit of all. But a regulation that a particular packet or any vessel employed in carrying passengers as a packet should not come to the wharf at all, or if it did, that it should be subject to an excessive rate beyond other vessels of a similar description would evidently be one of a very different kind. It is impossible to hold that this order is not one of this objectionable character. The charge on the owner of the boat touching at the wharf is a restriction on his right to use it, not applicable to the owners of other boats, and professedly imposed on him for ferrying passengers without hire, which, as the law stands, it is lawful to do. And the payment of head money, though imposed on the owner of the boat, would, if enforced, prevent boats to which it applies touching at the wharf at all and thereby compel persons wishing to embark in them to resort to some other place of embarkation, though they have a right to use the wharf for embarking in any boat they please. It would, therefore, be as complete an infringment on their right, with respect to those boats, as if it were imposed on the individuals themselves.

Again confining our attention to the 15 *Vic.* cap. 34, alone, without referring to the object of other Acts on similar subjects, does it authorize a rate on boats? The maxim "*expressio unius est exclusio alterius*," or as Lord *Bacon* expresses it, "as exception strengthens the force of a law in cases not excepted,

so remuneration weakens it in cases not enumerated," must apply. *Broom*, in his Legal Maxims 516, puts as an example of this rule that "where certain specific things are taxed or subjected to any charge, it seems probable that it was intended to exclude everything else of a similar nature." And in *Dewhurst v. Felden*, 8 Scott N. R. 1013, where by Statute 5 *Wm.* 4, cap. 45, sec. 27, the right of voting in boroughs is given to every person who occupies either as owner or tenant "any house, warehouse, counting-house, shop, or other building, either *separately* or *jointly with any land*, within such city or borough occupied therewith by him under the same landlord, of the clear yearly value of not less than £10; it was held that under this section *two distinct buildings* cannot be joined together in order to constitute a borough qualification. "The rule *expressio unius est exclusio alterius*," observed *Tindal* C. J., "is, I think applicable here. I cannot see why the Legislature should have provided for the joint occupation of *a* building *and land*, and not for that of *two different buildings*, if it were intended that the latter should confer the franchise."

The twelfth section of this Act gives the Governor and Council power to establish rates to be paid by *vessels*. According to this rule though all craft coming within the meaning of the term *vessel* were intended to be free of wharfage rate, it cannot be held and was scarcely contended that a *boat* comes within the meaning of the term vessel. Indeed the general wharfage Act, 7 *Vic.* cap 13, which, prior to this Act of 15 *Vic.* applied to this wharf, and also the *Charlottetown* wharf Act only imposes rates on vessels over ten tons burden, and as the Legislature must have been aware of this when in 15 *Vic.* a rate is authorized to be put on *vessels*, we must presume vessels of the same description are meant, besides the 17 section of this Act of 15 *Vic.* directs the *Charlottetown* Wharfinger to remove *vessels* and *boats* which obstruct the approach of the ferry boat. This plainly shews boats were not intended to be comprehended in the 12 section, because when they are to be dealt with they are specifically warned. Under these words, therefore, a boat is free, and the general power contained in the subsequent part of the section to make other rules and regulations for the management of the wharf cannot authorize a rate on craft which by the words immediately preceding are exempt.

Secondly, Can the head money in respect of passengers

imposed in this order be recovered from the owner of the boat?

I have already stated why the general words of this Act are not, in my opinion, sufficient to authorize the restriction of the right of every one to use the wharf. But this charge of head money is in reality a rate imposed on the boat because she is there for a particular, but lawful purpose, *viz.*, to carry passengers, and seems, therefore, as unauthorized as the direct charge of two shillings and sixpence for touching at the wharf.

Indeed, if the words of the order were even inserted in the Act, it would seem difficult to hold the owner of the boat liable for the head money. Acts (says Mr. *Dwarris*) "which impose a duty on the public, will be *critically* construed with reference to the particular language in which they are expressed." The words of the order are "boat used in ferrying for or without hire passengers, &c, over the said ferry and landing *or taking off the same from the said wharf*." Now when a boat is lying at a wharf and persons of their own accord go on board, can it be said that the boat takes them off the wharf? The expression might, perhaps, apply to goods taken by the owner or crew from off the wharf and placed in her; but I cannot see how (without drawing very largely on popular meaning) it can be said she takes off persons who come on board of their own accord. And if it be said to mean (which, I think, is its correct meaning) the departing, or going off with them from the wharf after they are on board, there is, evidently, no power to impose such a tax, unless it could be imposed in respect of persons who had embarked in her without using the wharf, for instance, by entering from another boat.

To sum up what I have said. If the wharf be looked at as a public right, the words of the Act are not sufficiently clear and unambiguous to authorize the charge for using it. If we look for the intention of the Legislature by comparing this with other Acts in *pari materia*, it did intend to authorize its imposition, and if we confine ourselves to the words of the Act alone, it is equally clear that no such rate was contemplated.

Both the *Chief Justice* and myself have given this case the fullest consideration, and we are both of opinion that the Judgment in the Mayor's Court is erroneous, and must be quashed.

M'LEAN v. WHELAN.

Trinity Term. 1856.

Challenge to array—Court will set aside special Jury panel for misconduct of officer returning it—certainty and conclusiveness of allegations necessary in affidavits to support application.

This was an application to the Court to quash the special Jury panel for alleged partiality in the under Sheriff by whom it was returned. The grounds urged, as manifesting partiality, are contained in a lengthy affidavit made by the plaintiff; but before noticing them it will be convenient to dispose of an objection taken by defendant's Counsel, *viz.*, that no *Challenge* can be made to the array in Special Jury cases. It is laid down in *Archbold's Practice*, 424, that "it seems very doubtful if the array in Special Jury cases can be challenged." But it is not to be understood from this that there are no means of raising an objection to a *Special* Jury panel for indifferency, or misconduct in the officer who returns it. On the contrary, in examining the authorities it will be found that the reason why what is technically termed a challenge is not permitted in such cases, is not that such an objection cannot be taken at all, (if such were the case the strange anomaly might be presented of a Court compelled to proceed with a trial, where gross partiality and misconduct in the officer returning the Jury was not denied, and where, perhaps, every member of the Jury had, confessedly, been nominated by one of the parties); but because in such cases the Jury are returned under the authority of a *Rule of Court*, with which the Court has always power to deal in a summary manner, according to its discretion, and, therefore, the proper mode of complaining of the officer's misconduct in acting under that rule, is by application to the Court. This point is very fully considered in the elaborate judgment of C. J. *Abbott* in *The King v. Edmonds*, 4 B. & Ald. 481, where, after adverting to the authorities and stating the reasons which inclined him to think a challenge to the array of a Special Jury could not be made, says, "now the nomination of a Special Jury by the known and general officer of the Court, whether the clerk of the Crown, or the master of the office, or otherwise, is precisely analogous to a nomination by elizors specifically appointed by the Court for the particular

purpose; and, as the array cannot be challenged in the latter case, I am unable to discover any satisfactory reason for saying, in the absence of all practice and authority, that it may be challenged in the former. The reason for disallowing it holds equally in both cases; *the Court may be applied to.* If there be any reasonable personal objection, known beforehand, the Court will, upon proper application, order the nomination to be made by another officer: if any *reasonable objection arises from the conduct of the officer on the particular occasion*, the Court, having power over its own rule, at least until everything shall have been completed under it, can reform and correct, and, if necessary, make a new rule for nomination by another officer, or abrogate the rule entirely, and leave the nomination to the Sheriff. If the application be not made, or be refused by the Court as unreasonable, it may well be supposed that no reasonable objection exists, especially when it is considered that the party has the power of striking out twelve names." Another reason he observes against allowing them is, that "such challenges might be used for the purpose of delay, and must be tried at the assizes in the absence of the person by whom the panel was formed, and consequently, without any opportunity of answer or explanation; whereas the Sheriff and Coroners are bound by the duty of their office to attend at the assizes, and in fact almost invariably do so." It must be observed that in *England* the Special Jury is named by the master, but the practice here has been (whether warranted by law or not it is not necessary here to enquire) for the Sheriff to select and return the panel. That part of the *Chief Justice's* reasoning against allowing the challenge, that the officer who found the panel would be absent, and could not, therefore, make affidavit in answer, or explanation of charges of misconduct, may not apply here as a reason against even a formal challenge; but the whole tenor of his remarks clearly shews that where the objection cannot be taken as a strict challenge, it may be taken *by application to the Court*, which answers the argument urged by the defendant's Counsel, that an objection cannot be taken at all.

In *Tidd's Practice*, 905, it is laid down "that as there can be no challenge to the array for an indifferency of the master of the Crown office, he being an officer of the Court expressly appointed to nominate the Jury, the only means in such cases is to apply to the Court, by motion, to appoint some other

officer to nominate a Jury." Indeed if the plaintiff had gone to trial, and a verdict had been improperly returned against him, and a new trial was moved for, the fact of his ommitting to to make this application might be used against him in answer to that. Thus in the same case of *The King v. Edmonds*, *Abbott* Ch. J. says, " we are all of opinion that the challenge to the array cannot be taken, and as these defendants had two entire terms in which they might have applied to this Court, and forbore to do so, unless their objection could prevail as grounds of challenge they must be of a very plain and cogent nature to induce the Court to listen to them at this stage of the proceedings for the purpose of a new trial."

The present application being, therefore, the proper mode of raising the objection, we proceed to consider the grounds and substance of the objections.

In *Coke Litt.*, 156 a., it is laid down " *If one or more of the Jury be returned at the denomination of the party, plaintiff, or defendant, the whole array shall be quashed. So if the Sheriff return any one that he be more favorable to the one than the other, the whole array shall be quashed.*" And in *Tidd's Practice*, 904, the general grounds of exception to the Jury panel are thus stated, " challenges to the array are at once an exception to the whole panel, in which the Jury are arrayed or set in order by the Sheriff in his return, and they may be made on account of partiality, or some default in the Sheriff *or his under officer* who arrayed the panel. And generally speaking the same reasons that before awarding the venire were sufficient to have directed it to the Coroner or elizors will be sufficient to quash the array when made by an officer of whose partiality there is any good ground of suspicion. Also though there be no personal objection against the Sheriff, yet if he array the panel at the *nomination or under the direction of either* party, this is a good cause of challenge to the array." From these authorities it appears that if there be *good grounds for suspecting* that the Sheriff has been influenced in selecting the Jury by a desire to favor one of the parties, no matter whether that desire arrives from personal favor, personal dislike, political feeling, or any other causes which influence men's acting, the array must be set aside. To sustain the charge of partiality against the under Sheriff in this case, the plaintiff, in his affidavit, sets forth that the defendant is the Editor of a Newspaper called the "*Examiner*," (which, he

alleges, is the organ of the political principles of the present Government) which contains the alleged libel, and that the plaintiff is the Editor of a Newspaper called the "*Islander*," which is strongly opposed to the political principles of the present Government; but except so far as it may go to prove that the Deputy Sheriff's political principles agree with the defendant's, which is amply proved by other allegations in the affidavit, I cannot see what this has to do with the present question, his belonging to one political party or the other is no disqualification for the office. Nor is it any crime to recommend one to a Sheriff as a deputy, and if the Government or any member of it did so, or had any understanding with the Sheriff on the subject, the presumption is, they thought him a fit person for the appointment. I lay this allegation respecting the under Sheriff's appointment, therefore, out of the question and as equally irrelevant those of his having been before the Grand Jury.

The first material allegation in the affidavit is, that out of the 48 Jurors returned 43 or 44 are partizans of the political party opposed to the "*Islander*" Newspaper and to the plaintiff; most of them holding extreme views and having strong political feelings and many of them being leaders at public elections. It is not easy to define what is meant by a political case, and yet it is not difficult to understand that when the dispute is between two Editors of papers which are, respectively, the organs of opposing political parties, and when the cause of the dispute is an alleged libel by one of those Editors against the other, there may be a strong desire among active political partizans on the one side, for the plaintiff's success, and an equally strong wish on the other for his defeat. We quite agree with the defendant's Counsel, that to find persons who had no political bias would, especially in a small country like this, be next to impossible. Mere political bias, or opinion, can, it is evident, form no objection, if it did, no Jury could be empaneled in such a case as the present. But we apprehend there exists a wide difference between opinions resulting from calm and sober reflection which lead men to adopt one set of political principles in preference to another, and that excitement and frequently strong personal hostility which men, even of the highest integrity and honor, who enter the political arena and engage actively in political contests, can seldom avoid feeling. In the one case, few would think it

likely they would allow their political feelings to influence their judgment, while in the other, one knows an extraordinary restraint must be put on their feelings if they did not. Now when in a case, which there is reason to believe, enlists the feelings of opposing political parties, a complaint is made that the whole panel (with very few exceptions) is composed of persons all on one side, and holding extreme views, and so actively engaged in political contentions, and that the officer who returned them is an equally violent political partizan on the same side, it does appear to us that these facts *if properly substantiated* afford very strong ground for suspecting that officer's partiality.

The next material allegation in the affidavit is, that the plaintiff "saith that he has good reason to believe and does believe that the said defendant, or some person on his behalf, hath had some act or part in the selection of the said persons in the said panel, or some of them." There is no doubt from the authorities, if it appears that any individual juror has been returned at the instance or nomination of a party, that fact alone, without anything else, evinces a partiality in the Sheriff sufficient to quash the array. The question again arises, is this last charge sufficiently supported by this allegation? and here we must observe, that where a party making such a complaint as this plaintiff does, is by his own shewing, an active political leader, or warmly engaged in political contests himself, we should have expected his statements, with regard to the political feelings and opinions of the individuals named in the panel and of whose return he complains, to be supported by something more than his own affidavit. We should have expected that (in the language of the affidavit) those credible and experienced persons acquainted with the Jurors named, who have examined the lists would have made an affidavit adding the weight of their opinions and knowledge of those individuals to that of the plaintiff, because it is quite possible that political controversy may lead him to attribute more violent feelings to his opponents than they deserve, and under these circumstances had the defendant put in an affidavit even generally denying the material charges alluded to, we should have experienced little difficulty in making up our minds to refuse his application. But no affidavit was produced in shewing cause, and the question, therefore, is, whether the plaintiff's affidavit alone and the mode of allegation adopted in stating

the facts is sufficient. The affidavit states, positively, that from his own knowledge, and as he is advised and believes, 43 or 44, of the panel are violent partizans and holding extreme views &c. The certainty and directness with which facts should be deposed to in an affidavit, must very much depend on the particular circumstances of the case and the nature of the facts. In *Archbold's Practice*, 1445, it is said "the only general rule which can be laid down is, that the affidavit should set forth all the facts expressly and with certainty, and that where deponent swears to any fact as within his own knowledge, he must swear distinctly and positively. Where the fact is not within the deponent's knowledge so much precision is not necessary. Where a deponent states a fact from information, he should, in general, add that he verily believes it to be true. An affidavit that deponent '*verily believes*' is entitled to some credit *in the absence of a contrary affidavit*. Now looking at the nature of the facts deposed to in this case, they appear to be stated with as much precision and certainty as could be expected. I have already said that we think the plaintiff's statements to some of the facts should have been supported by other affidavits of disinterested persons. But evidence given, either orally or by affidavit, though at *first* only of that slight or *prima facie* character which raises a degree of probability in its favor, may become quite strong and satisfactory in consequence of not being rebutted by other evidence, especially where the party against whom it is adduced, has the means of refuting it in his power if it be untrue. Thus in 1 *Starkie on Evid.*, 545, it is laid down "that it very frequently happens that evidence which in itself is but inconclusive, derives a conclusive quality from mere defect of proof on the part of the adversary. Where a party being apprised of the evidence to be adduced against him has the means of explanation, or refutation in his power, if the charge or claim against him be unfounded, and does not explain or refute that evidence, the strongest presumption arises that the charge is true. It would be contrary to all experience of human nature and conduct to come to any other conclusion." It is impossible to look at the charges stated as evidence of the under Sheriff's partiality in this case, without seeing that the defendant had the means of refutation in his own power. One of those charges is, that the plaintiff has good reason to believe that the defendant, or some one on his behalf, has had some

act or part in the selection of the Jurors named. Now this is matter particularly within the defendant's own knowledge alleged in such a manner as according to the case of *Maton v. Hayter* cited by *Archbold*, called for an answer, and which, if untrue, he could very easily have controverted. Again, the charge that so large a proportion of the panel is composed of partizans and violent political leaders, was a matter which the defendant could have no difficulty in rebutting, if their political character was not correctly described. The under Sheriff himself, for his own reputation, would have been willing to contradict it, if it were untrue, or offer such explanation as would shew that he was unaware of their violent political prejudices and, therefore, was actuated by no improper motive. Ch. Justice *Abbott* in the case of *The King v. Edmonds* expressly alludes to the duty of the Sheriff to answer such a charge when he says, "*the Sheriff or Coroner are bound to attend the Court and are, therefore, there to answer or explain any charge of partiality or misconduct in selecting the panel.*" Indeed we can find no case where such a course as this has been pursued in resisting a motion made under similar circumstances. In *The King v. Edmonds* the grounds of complaint against the master of the Crown office were of a much less suspicious character than in the present instance. That office in *England* is always filled by a person of the highest character for learning and integrity, and yet on that occasion we find he makes an affidavit particularly explaining every charge from which partiality in him was attempted to be inferred. Under these circumstances *in the absence of any affidavit to contradict the charges*, we are bound to believe that the statements in the plaintiff's affidavit are not capable of being controverted. Then what is the substance of those statements? It is this: that the parties are, respectively, Editors of political papers opposed to each other—the action, for libel, in which the sympathies and fe lings of political parties are strongly enlisted —that the defendant has obtained an order for a Special Jury —that 43 or 44 (a number very difficult to believe the result of accident) out of 48 persons named in the panel are partizans or violent political leaders, on the same side as the defendant —that the under Sheriff who selected the panel is, himself, a violent political partizan on the same side. That the defendant himself or some person on his behalf has had some part in selecting some of the persons named on the panel it is im-

possible to believe, as (under the authorities) in the absence of any affidavit to the contrary, we are bound to believe their statements to be true and allow this panel to stand.

It was urged by the defendant's Counsel that the objection to individuals might have been taken as a challenge to the polls. Undoubtedly some of the complaints made against individual Jurors, such, for instance, as that he had expressed an opinion beforehand, or a desire to be put on the panel, might have been so taken, and, therefore, in considering the question we have abstained from adverting to them at all. There is, however, a very strong and positive allegation respecting Nos. 10 and 42, *viz.*, that they are quite unfit for any Jury by reason of their deep prejudices and low standard of morals which, it is positively stated, is open and notorious. Now though this may be good challenge to the polls, yet, if they are *openly and notoriously* what they are described, the under Sheriff must have been aware of it, and it is very extraordinary to see them returned on a *Special Jury*, and, therefore, this fact, taken in connection with the other circumstances, tends to strengthen the suspicions against his impartiality.

In all cases of this kind the Court has power to mould the rule in such way, or to give such special directions as it thinks most likely to secure an impartial selection. Thus in some cases a particular class of individuals, such as shareholders in a certain Bank, or Company, or inhabitants of a certain district, are ordered to be excluded. In one case it was ordered that no persons residing within 8 miles of a certain town should be selected. In a small community, where we know party feeling runs high, it may not be easy for any one to select a panel with which one party or other may not be dissatisfied. Accidental circumstances seem to present the means in the present case of avoiding even this. It appears that three Special Juries have been returned by the same under Sheriff, in three other cases, of whose respectability and fitness for the duty, the Court has had some means of judging from having Juries drawn from them empanelled before it at this term. The order will, therefore, be, that this panel be set aside and a new one returned by the Coroner, *D. Hodgson*, Esq., and that in forming such panel he shall place the names of the persons on the Special Jury panels in the several cases of *McGill v. McLean*; *Kavanagh v. Lydiard*; *and Reddin v. Dingwell*, respectively, on separate pieces of paper in a box,

and shall draw 48 names from the same, which shall form the panel, and that the Attorneys on both sides shall have notice to attend if they see fit, and the Jury be afterwards struck before the Prothonotary in the usual manner.

PLEADWELL v. BRENAN.

Hilary Term, 1857.

Surveyor of City of Charlottetown has no power to remove an erection which he thinks encroaches on the Street, but which has not been used as a Street—City Bye Law giving him such power *ultra vires* and void.

This was an appeal from the Mayor's Court and is brought to ascertain the construction, and test the validity of the 3 & 4 Sections, Cap. 23, of the City Bye Laws. The 4 sec. on which the argument chiefly arises enacts "that until there shall be a survey and plan of the streets of the City established by law, it shall be the duty of the City Surveyor, before granting the certificate mentioned in sec. 3, to be guided by the following regulations, viz., he shall not allow or grant permission for the erection of any house, porch, fence, wall, steps or other erections facing upon the Streets of the City, to project outside of the line of houses already built, or outside of the nearest houses adjoining right and left, as the case may be, or in and upon what has been, heretofore, considered and used as the Street. *If the Surveyor shall be in doubt as to the true line of the Street he shall be guided by the plan of the Streets made by the late Surveyor General, George Wright and kept in the Office of the Keeper of Plans, which plan shall be considered as giving the correct line for all City purposes until the same shall be altered and a new one substituted.*"

In the year 1833, a survey and plan of the city, alluded to in this section, was made by Mr. *Wright*. The defendant's fence, which is complained of as an encroachment, is on that plan represented as encroaching 14 feet on Sydney Street. The old fence has been recently removed and the present one erected on the same site. It is not disputed that the 14 feet now claimed as part of Sidney Street before and ever since Mr. *Wright's* survey has been fenced in and held by the defendant or those through whom he claims as their own. It is admitted that the fence agrees with the line of houses in the street on

the West, but projects outside the line of houses on the East. There is no evidence to shew that *Wright* was guided by any original plan in making his survey, or that any old or established boundaries or points of commencement were pointed out to, or used by him as the base of his operation. Nor is there anything to shew that the piece of ground in question was ever used by the public as a Street, or acknowledged by the owners of the Lot to be so.

The evidence of Mr. *Smith*, the City Surveyor, merely goes to shew that assuming *Wright's* plan to be a correct representation of the City and its Streets, the fence is as represented an encroachment of 14 feet on Sydney Street. The only evidence, therefore, of its being an encroachment is that it is represented on the plan to be such.

The 50 sec. of 18 *Vic.* Cap. 34, which incorporates the City enacts "that the City Council shall have exclusive power to open, lay out, regulate, repair, amend and clean *the Streets and Alleys* of the City and to prevent the encumbering of the same in any manner, and to protect the same from encroachment and injury by such Bye Laws and ordinances as they may from time to time pass." And at the end of the section there is a proviso "that nothing therein contained shall be construed to extend to authorize the opening of any roads or highways through the private property of any person or persons without complying with the provisions of any Act or Acts then in force providing for awarding of damages to any person or persons who may be injured thereby."

It was argued by the *Recorder* that by this section a supreme power is vested in the City Council whenever they see fit to widen the present streets or to open new streets, and to remove any buildings, fences or erections necessary for that purpose. But it is quite clear the Act gives the City Council no such power. The first part of the section authorizes them to open, lay out, regulate &c, *the Streets and Alleys* of the City. These words can only apply to the Streets existing at the passing of the Act, or which by dedication, user or those legal means may afterwards become streets. But they do not authorize the widening of the present streets, or laying out new Streets, or any interference with the private property of the citizens. But it was urged that the proviso at the end of the section that the Act should not extend to authorize the opening new roads without complying with the provisions of the

Acts for compensating parties injured, contains, to use the Recorder's expression,"a *negative* pregnant," or in other words, implies authority to open them if compensation is made. There is no rule in the construction of Statutes better understood or more uniformly acted on than this, that a power to impose a public burden or interfere with private rights can only be given by plain and positive words and cannot be conferred by implication or inference. But even if it could there is here no ground for the argument. The first part of the section can by no construction give such power. The proviso (which appears merely introduced by the framer of the Act *ex abundatia cautela*) says new Streets shall not be opened without complying with the provisions of the Act in force for awarding compensation to parties injured. What are the provisions of those Acts? They all vest the power of opening new roads in the Governor and Council. To comply, therefore, with the provisions of the Acts in force for awarding damages referred to in the proviso, the City Council, if they desired to widen a Street or open a new one, must, like any other parties, apply to the Governor and Council for authority to do so, before whom, the parties to be injured (if they objected) might be heard, and who alone have power to decide whether a proposed Street is so necessary for public convenience as to justify the invasion of private rights.

Secondly, it was urged that by the 4 sec. of the Bye Laws Mr. *Wright's* plan is established as conclusive evidence of the position of the Streets and, therefore, anything represented on that plan as an encroachment, must be held to be so. I do not think the Bye Law bears any such construction. It seems simply intended as an instruction for the guidance of the City Surveyor, leaving him (where parties really claim a right) to maintain, by the ordinary mode of proof, that any erection he may deem a nuisance really is one If it can be construed as going further than this, and enacting, as the *Recorder* contends that *Wright's* plan shall be conclusive evidence in all such cases, I have no difficulty in saying that, in this respect, the Bye-Law is *ultra vires* and void.

A power of making Bye-Laws for the government of the City is, by several sections of the Act of Incorporation, given to the City Council. But those laws must not be repugnant to the Common Law, nor to any acts of the Legislature. Now, suppose the defendant had been indicted for a nuisance

in maintaining this fence, or suppose, on the other hand, the City Surveyor, under the orders of the Mayor, had removed this fence and the defendant had brought an Action of Trespass against the Mayor and Surveyor for doing so, by what evidence must the prosecution have been supported in the one case, or the defence maintained in the other? By giving in evidence the original plan and survey of the Town, or by shewing that the part alleged to be encroached on had been used as the Street. This would furnish prima facie evidence of its being so. But it would be open to the individual claiming the land to shew that it had not been used as the Street, or in answer to the evidence of the old plan, to shew that the original plan of the Town had either intentionally or by mistake, been departed from, and, for that purpose, it would be open to him to adduce evidence that the general line of the houses or fences on the street differed from such old plan, or any other kind of evidence tending to shew that the old survey by which the inhabitants had been guided in making their improvements had, either by the authority of the Government of the day, or through the mistake of the person executing it departed from the plan, and it would then be for a Jury, looking at all the evidence, to say whether the ground in dispute was street or not.

It was also urged that the Lot, of which the defendant contends the ground in question forms part, exceeds the quantity which, according to the grant, it ought to contain. But an excess of land beyond the quantity named in a deed or grant, is a very common occurrence, attributable, as all experienced in litigation respecting lands in this Island are aware to inaccuracies in the original surveys, and usually raising a very slight presumption against the occupier. The true inquiry in all disputes respecting old boundaries being not so much what would be the precise metes and bounds of the premises according to the description contained in the deed or grant, as what were the bounds actually laid down by the Surveyor acting either for the Crown or an individual grantor in laying off the land. And where a grantee takes possession under such a survey, and holds and improves for a length of time to the bounds so laid down his title to the premises comprised within them cannot be disputed, although the whole may no correspond with the description, or exceed the quantity mentioned in his deed or grant. If an error in boundaries so

established were allowed to be rectified long after the party had taken possession and improved on the faith of their correctness, the most valuable improvements might be lost and ruinous consequences result to individuals.

This principle is well illustrated in the case of *Doe dem Carr v. Mc Cullough* decided in the Supreme Court of *New Brunswick* and reported in 1 Kerr's Rep. 464. In that case 100 acres were conveyed and the description was as follows "Beginning at the South West corner of the said Lot No. 10 and running in a Northerly direction upon the dividing line between vacant land and the Lot No. 10, *forty rods* thence in an Easterly direction, preserving the *same front to the rear of the said Lot.*" In 1820 the division line was, by consent of the grantee of this lot and the adjoining owner, run by one *Fisher*, a deputy Surveyor, the parties intending that it should be run according to this description, and for many years the parties uniformly acquiesced in and acted upon the line so run by *Fisher*. In 1840 the lessor of the plaintiff caused a new survey to be made when it was found that the defendant's Lot was much wider in the rear than in front, being at one place 58 rods and in the extreme rear 61½ rods wide instead of 40 rods as expressed in the deed, and it seemed that *Fisher* had diverted from the true course after passing a pond which lay in the range of the line. The Judge told the Jury that if, on the evidence, they were of opinion that *Fisher's* survey was made by the authority of the plaintiff and had been acted on for a number of years he would be bound by it, and if they were not satisfied of this, then, according to the terms of the deed, the plaintiff was entitled to a verdict for the 50 acres, being the quantity of overplus held by the defendant. The verdict was for the defendant, and on a motion for a New Trial the direction was held right. Chief Justice *Chipman*, in his Judgment says "the principle involved in this instruction of the learned Judge to the Jury has always been hitherto acted upon in this Province, in cases of this sort, and I would be very unwilling to depart from it. It, undoubtedly, operates as a species of *estoppel in pais* and is, I conceive, founded on the strongest considerations of public convenience, and good policy in the loose and uncertain condition of boundaries which prevails throughout the Province. There was express authority to run the line by *Fisher* and the lessor of the plaintiff has adhered to it for a period of nearly, if not quite 20 years. On

the faith of this conduct of the lessor of the plaintiff, the other parties acted in holding possession and making improvements up to the line on their side. To disturb their present enjoyment of the land would, I think, be doing injustice to them and be attended with very injurious consequences as a precedent." And Justice *Carter*, before whom the case was tried, says, "I have seen no ground for changing the opinion I expressed at the trial of this cause. I have always considered the principle which I then laid down to the Jury, as one long settled in this Province, originally founded on the circumstances and almost the necessities of the country, and now so repeatedly sanctioned as almost to become part of the Common Law of the country. The great amount of difference in this case between the two lines appears to me the only new feature in it. But once admit the principle and it must equally avail whether the difference be 2 rods or 60. That the general effect of this principal is good and beneficial, no one who has had much experience in the litigation of boundaries can, I think, deny, and if we once give up this rule there are few boundaries which the ingenuity or ignorance of Surveyors might not throw into doubt or dispute. And all such questions would, probably, be tried by the comparative multitude of Surveyors which either party could procure to favor his interests."

If this principle applies to the boundaries of wilderness land, how much stronger is the reason for applying it to Towns and Cities where an error of a few feet may often interfere with property of great value. It is true in the case cited the principle was applied to a line run between two individuals, but I see no reason why it is not equally applicable in a dispute respecting the boundary of a Street.

In laying off a Town, the side of each Street forms the boundary between it and the lots fronting on it. The Surveyor executing the original survey acts on behalf of the Crown, and if he through mistake lays out a Street narrower than was intended, or departs from the straight line or precise course he should have run, and the individuals settling on the lots hold and improve either by building or fencing up to the line so erroneously laid out, the injury is the same whether an occupier loses his improvements in front under a claim of Street, or on the side, under the claim of his neighbor. The reason for the application of the principle is the same in both

cases and must, I think, operate with equal force to stop both the Crown and the public from afterwards rectifying the error, even though the description in the grant should shew that there was one.

The case is an important one in consequence of the multiplicity of interests involved in the questions which have been raised during its discussion, and it has been forcibly argued by the learned *Recorder* in the only way it could be put; but for the reasons I have stated I cannot concur in the arguments he has adduced. The consequences which would result from their adoption never could have been intended. It is a principle of *British* Law that no man shall be deprived of his possession except by the verdict of a Jury. To adopt the arguments of the *Recorder* I must suppose the Legislature intended to give the City Council power to deprive the citizens of this privilege in questions of this sort. Because if *Wright's* plan is to be taken as conclusive evidence everything represented on it as an encroachment must be held to be such, and it would then be useless for an occupier to appeal to a Jury who would be bound to return a verdict in accordance with the plan. Thus a person might be dispossessed of land he had occupied for 50 or 60 years, or, indeed, any length of time, merely because this modern plan represents it as part of the Street.

It is unnecessary to advert to the argument, that under the Bye-Law the party might keep up a fence or other erection made before *Wright's* survey, and is only prohibited from erecting another when that is removed, because if the occupier's title to the land is valid the City Council could not prevent his erecting a house, fence, or anything he pleased upon it. And if it was not he could not maintain them though previously erected.

The Act gives the City Council ample power to prevent nuisances on what has been heretofore used as a Street, and for that purpose *Wright's* plan (if properly authenticated) might be valuable evidence and the 23 Cap. of the Bye-Laws looked at as a code of instructions for the guidance of the City Surveyor is, probably, as judicious as, under the circumstances, could have been framed. But the Act of Incorporation gives the City Council no such power, as from the construction

attempted to be given to the Bye-Laws, they would appear to claim.

The Judgment of the Mayor's Court must be reversed.

BRENAN v. M'ISAAC.

Hilary Term, 1857.

A person employed as a shopman and who lives in employer's house liable to conviction under the Servants' Act 3, *Wm.* 4, Cap. 26.

Appeal from a conviction against defendant under the Servants' Act 3 *Wm.* 4 Cap. 26, for hiring plaintiff's servant.

The servant was a person employed by plaintiff (who is a merchant) as a shopman and lives in plaintiff's house.

Held that he was a menial servant and therefore within the Act and conviction affirmed.

Quaere. Are other servants not coming within definition of menial or domestic servants within the Act?

Authorities cited *Toml.* Law Dict. "Servants" persons employed by men of trade and profession under them to assist them in their particular callings, or such persons as others retain to perform the work and business of their families. And servants are menial if not so—menial being domestic or living within the walls of the home.

Howlan v. Abbott 2 C. M. & R. 57. The *Gardiner's* case.

IN CHANCERY.

HOWATT *v.* LAIRD.

Injunction - Equity will restrain owner of Mills on Stream from penning back water to injury of plaintiff below so far as such detention is really prejudicial, but no further—General principles on which Equity exercises its power in such cases—Where from circumstances it appeared that penning back the water between 10 o'clock at night and six in the morning, would not really injure plaintiff, Court refused to restrain him between those hours.

The Injunction which has been granted in this case is an Injunction to restrain the defendant from penning back the water, or interrupting the flow of the stream between the hours of 4 o'clock in the morning and 11 at night of each day. The plaintiff is the owner of certain Mills on the lower part of the stream, and the defendant, of other Mills higher up, and the plaintiff complains that in consequence of the water being penned back by the defendant, for the use of the upper mill, its regular flow to his Mill is interrupted. That he brought an Action in the Supreme Court against the defendant and one *Benjamin Crew* and recovered a verdict for nominal damages of 1s, on which verdict Judgment was, after argument, given for the plaintiff, on the ground that it was an injury to his right. The Bill further states that, since such Judgment, the defendants have been in the habit of penning back the water so as to impede the working of the plaintiff's Mill and thereby damaging his business. Numerous witnesses have been examined on both sides, but as the material facts elicited are substantially the same as were stated in the affidavits, used on the motion to dissolve the Injunction in 1851, and to which, in the decision then given, I adverted at some length, I do not think it necessary particularly, to refer to them on the present occasion any further than to say that after a careful perusal of all the evidence now adduced, I come to the same conclusion I did then, viz., that the defendants were in the habit, and claimed a right of interrupting the natural flow of the stream for considerable periods of time, at such times as suited their convenience for the purpose of raising a head of water for their Mill. Neither shall I now enter into an examination of authorities which, on the argument in the Supreme Court, as well as on the occasion alluded to, I reviewed at considerable length. The principal authorities then adverted to were 3 *Kent* Com. 419, *Greensdale v. Halliday*,

6 Bing. 381, *Greaves v. Bushey*, *Tyler v. Wilkinson*, 4 *Mass.* Rep. 401, *Sackrider v. Beers*, 10 *Johns* Rep. 241, *Shears v. Wood*, 7 Moore 543, *Howard v. Wright*, 1 Sim. & Str. 190. *Bealy v. Shaw*, 6 East 214, *Masson v. Hill*, 3 B. & Adol. 304 and 5 Adol. & Ell. 18 *Wood v. Waugh*, 13 Jur. 472, *Williams v. Moreland*, 2 B. & C. 910, *Hanson v. Gardiner*, 15 Ves. 136 *Coward v. Tinkler*, 19 Ves. 619, *Atty. Genl. v. Hallett*, 16 Mees. & W. 568, *Coulson v. White*, 3 Aitkens 21, *Atty. Genl. v. Nichol*, 16 Ves. 342, *Winstanley v. Lee*, 2 Swans Rep. 333, *Atty. Genl. v. Eastern Railway Company*, 7 Jur. 806, *Thomas v. Oakley* 18 Ves. 185, *Webb v. Portland Canal Company*, appendix to Angell on Watercourses.

Smith v. Clay 3 B. & C. 640. The cases of *Dickieson v. The Grand Junction Canal Company*, 9 Eng. L. & Eq. Rep. 520 *Embry v. Owen* 4 Eng. L. & Eq. 476 and *Wood v. Sutcliffe*, have occurred since the previous occasion on which I had to consider this case.

The general law on this subject is stated in *Embry v. Owen* to be correctly laid down in the following passage from *Kent* Com.—"Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him unless he has a prior right to divert it, or to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along '*Aqua Currit et debet currere*' is the language of the law. Though he may use the water while it runs over his land, he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his Estate. Without the consent of the adjoining proprietors he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back on the proprietors above without a grant or an uninterrupted enjoyment of twenty years which is evidence of it. This is the clear and settled general doctrine on the subject, and all the difficulty that arises consists in the application. The owner must so use and apply the water as to work no material injury or annoyance to his neighbor below him who has an equal right to the subsequent use of the same water. Streams of water are intended for the use and comfort of man,

and it would be unreasonable and contrary to the universal sense of mankind to debar every riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned, and there will, no doubt, inevitably be in the exercise of a perfect right to the use of the water some evaporation and decrease of it, and some variation in the weight and velocity of the current. But *de minimis non curat lex* and a right of action by a proprietor below would not, necessarily, flow from such consequences, but would depend on the nature and extent of the complaint or injury, and the manner of using the water. All that the law requires of a party, by, or over whose land a stream passes, is that he should use the water in a reasonable manner and so as not to destroy, or render useless, or materially diminish, or affect the application of the water by the proprietors below on the stream. *He must not shut the gates of his dam and detain the water* unreasonably, or let it off in unusual quantities to the annoyance of his neighbor. *Pothier* lays down the law very strictly that the owner of the upper stream must not raise the water by dams so as to make it fall with more abundance and rapidity than it would naturally do, and injure the proprietor below. But this rule must not be construed literally, for that would be to deny all valuable use of the water to the riparian proprietor. It must be subjected to the qualifications which have been mentioned, otherwise rivers and streams of water would become utterly useless either for manufacturing or agricultural purposes. The just and equitable principle is given in the Roman law, '*Sic enim debere quem meliorum agrum suum facere ne vinci deteriorem faciat.*'

As observed by the learned Judge, in *Embry v. Owen*, it is very difficult, perhaps impossible, to define precisely the limits which separate the reasonable and permitted use of a stream from its wrongful application; but there is often no difficulty in deciding whether a particular case falls within the permitted limits or not. Now it appears to me that where (as in this case) the owner of an upper Mill on a stream, the natural momentum of which is not sufficient to work it, pens back the water, not at any particular time, but just as suits his own convenience, it cannot but be more or less prejudicial to the Mill lower down, as it must render the owner of the lower Mill uncertain at what time he may have water to drive his Mill. It is true.

I find in a case of *Hetrick* v. *Deackler*, decided in *Pennsylvania*, and cited in *Angell*, page 122, where the plaintiff gave in evidence, "that the defendant withheld the water 3, 4 and 5 days, and at one time 13 days, and that at times he discharged the water in such quantities as to flood the plaintiff's Mill. The defendant, on the other hand, gave evidence to show that when he detained the water the stream was low and the season very dry, and that without the detention he could not saw at his Mill—that he only used the water for his saw Mill and for the purpose of watering his meadow — that the water was turned into its natural course before it left his premises—that the stream was a small one and insufficient for both Mills." The Judge left it to the *Jury* to say whether a detention at times of 3 days, at other times of 5 days, and one time of 13 days, in the defendant's dam, to the injury of the plaintiff's Mill, was longer than was necessary for the defendant's proper enjoyment of the water at his Mill as it passed through his land, and if they believed that it was longer than *necessary*, to find for the plaintiff, and if not, to find for the defendant. I am unable to reconcile this decision with the principle laid down in all the *English* cases and with the tests as to the reasonableness of the detention laid down by Judge *Story* in the much quoted case of *Tyler v. Wilkinson.* He says, "there may be, and there must be allowed, of that which is common to all, a reasonable use. *The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not.* There may be a diminution in quantity, or a retardation, or acceleration of the natural current indispensible for the general and valuable use of the water perfectly consistent with the use of the common right. The diminution retardation, or acceleration not positively and sensibly injurious, by diminishing the value of the common right is an implied element in the right of using the stream at all." Now can it be said that an entire cutting off of the natural flow of the stream, and detaining the water for three days or one day is not a retardation positively and sensibly injurious to the *common right*? That common right is the use of the momentum or power of the stream for the various purposes to which it is applicable, some of which require a constant application of its power. Is it possible that a total interruptio of its flow for 3 days, or one day, would not be injurious to persons so using it? Is the Carding Mill, the Fulling Mill, or the Turning

Lathe to stand idle because the Saw Mill higher up requires 3 days', or one day's accumulation of water to drive it at all? In *Shears v. Wood*, 7 Moore, 534, the upper proprietor erected a dam and detained the water from the plaintiff' copper Mills, and it being proved that copper Mills require a *constant supply*, the action was held to lie. And if an action would lie by the owner of *works* requiring such constant supply, it might likewise be maintained by one who had not, as yet, applied the water to any particular use, to preserve his right to do so. This is clearly laid down in *Wood v. Waugh* and *Angell* p. 466, after citing *Parker v. Griswold* where, in an action for diverting a watercourse, it was held that a sufficient cause of action was shewn, although the declaration did not aver the existence of any Mill, or other works of the plaintiff on his land, for the operation of which the water so diverted was needed, says, "it may, in short, be said to be an elementary principle of law, that wherever there is a wrong there is a remedy, and that every injury imports damage in the nature of it—and that if no other damage be established the party injured is entitled to nominal damages. This principal applies more strongly where there is not only a violation of the plaintiff's right, but the defendant's act, if continued, may become the foundation, by lapse of time, of an adverse right, and hence actual perceptible damage is not indispensible as the foundation of an action. An with regard to the rights of riparian proprietors on a watercourse, it is abundantly well established that the law tolerates no further injury than whether there has been a violation of right. If that appears the party is entitled to nominal damages at least."

On powerful streams disputes are not likely to arise as the detention of the water must be so temporary as not sensibly to interfere with the right of others to use it for any permitted use they may choose. But if a riparian owner can erect and use works so disproportioned to the power of the stream as to require a total penning back of the water for 3 days, or 2 days, or one day to enable him to drive his works for another, those lower down would have the user of the water, not as a *common right*, but in submission to him above, and must always be restricted in their enjoyment of it, in proportion as the upper owner might require a greater or less quantity to derive the gretest profit from his works, and the owner of machinery requiring less water and, therefore, better adapted to the power of the stream would be sensibly injured as the

stoppage must prevent his working so continuously as he otherwise might have done. That machinery must be adapted and the user of the water proportioned to the power of the stream, appears to me a principle deducible from all the cases, and particularly illustrated in the decision of *Embry v. Owen*, where the defendant was allowed to use the water to irrigate his land *because* the irrigation was *not continuous*, but only at intermittent periods when the river was *so full* that the diminution of the water was not perceptible to the eye and no damage was thereby done to the working of the defendant's Mill. Had the irrigation taken place at times when the river was not full, and when it would have caused a perceptible diminution of the volume of the stream, no doubt, the plaintiff would have recovered.

From all the evidence in this case it is clear that the defendants were in the habit of penning back the water at such times as their own convenience, or the necessities of their Mill required them to do so. It is true the interruptions were chiefly during the night, but there is ample evidence to satisfy me that they sometimes occurred during the day. Now although the interruptions took place chiefly at night yet the occasionally penning back the water in the day *under an assertion of right to do so* (which was evidently the case here) would, after 20 years, ripen into a right to pen it back by day or night as they chose, and as the acquirement of such a right must be injurious to the right of those below, the plaintiff was, no doubt, entitled to nominal damages.

It was urged by the defendant's counsel that the injuries here could be compensated in damages, and that, therefore, the plaintiff should be left to bring actions at law for the infringement of his right. But the principle on which Courts of Equity act in cases of this kind is, that if the injury caused by the diversion or interruption is frequently recurring or the right to continue it, is set up and persisted in by the defendant, in a Bill for an Injunction the Court will interfere effectually to protect the complainant. In *Angell*, in sec. 449, the equitable doctrine on this point is so perspicuously stated that it may be well to cite it at length. He says, "We have seen that an action on the case may be maintained for the diversion of a watercourse, or for making back water, even although no actual damage is thereby occasioned on the ground of the injury done to the right of the riparian proprietors affected

and the acquisition of an adverse right by the uninterrupted enjoyment of the diversion &c, for 20 years. On the same ground a *Bill in Equity* may be maintained in such cases for an Injunction, though there are some few cases in which it seems to have been considered, that as against a riparian owner seeking to erect an improvement on his own land, the complainant is bound to shew that his superior rights will be, not *probably*, but *really* and *sensibly* affected. The weight of authorities is, however, decidedly different. In a Bill in Equity for an Injunction by the plaintiff to prevent the defendant from diverting a watercourse from the plaintiff's Mill, the general doctrine is thus stated by Judge *Story*. If no action were maintainable at law without proof of actual damage, that would furnish no ground why a Court of Equity should not interfere and protect such a right from violation and invasion; for, in a great variety of cases the very ground of the interposition of a Court of Equity is, that the right can only be permanently preserved or perpetuated by the powers of a Court of Equity. And one of the most ordinary processes to accomplish this end is, by a writ of Injunction, the nature and efficacy of which, for such purpose, I need not state, as the elementary treatises fully expound them. If then the diversion of the water complained of, in the present case, is a violation of the right of the plaintiffs and very permanently injure that right and become, by lapse of time, the foundation of an adverse right in the defendant, I know of no more fit case for the interposition of a Court of Equity, by way of Injunction, to restrain the defendants from such an injurious act. If there be a remedy for the plaintiffs at law for damages, still that remedy is inadequate to prevent and redress the mischief. If there be no such remedy at law, then, a fortiori, a Court of Equity ought to give its aid to vindicate and perpetuate the right of the plaintiffs. A Court of Equity will not, indeed, entertain a Bill for an Injunction in case of a *mere trespass*, fully remediable at law. But if it might occasion irreparable mischief, or permanent injury, or destroy a right, that is the appropriate case for such a bill."

But in interfering in such cases the Court will have regard, not only to the strict legal rights of the parties, but to all the surrounding circumstances; to the injury, the enforcement of the strict legal right will occasion to the defendant, as well as the benefit its preservation will secure to the plaintiff. It will

not hesitate to protect the plaintiff in his strict legal right where that is necessary to secure him a reasonable use of the water, but it will refuse to interfere where the infringement complained of causes no practical damage to the plaintiff, and where the insisting on it will be ruinous, or highly injurious to the defendant. The attention of the Court in all such cases must be directed to ascertain what is necessary to be done to secure to each party a fair and reasonable participation of the common privilege, and to endeavor to mould its decree so as to effect that and nothing more.

I am glad to find that the order in the present case has nearly affected this, as I perceive the defendant states in his answer, and it is also asserted by his counsel at the bar, that since 1851 he has conformed to the time allowed by the Injunction, and yet has had sufficient water to work his Mill. According to this statement the defendant now has all the use of the water that is reasonably necessary for his Mill. But I am not disposed to lay hold of a particular expression of either party to impose a restriction greater, than from all the circumstances of the case, appears necessary to secure to each a fair participation of the common privilege. The defendant says that since the granting of the Injunction he has penned back the water only from 11 to 4, and yet has had sufficient to work his Mill. The plaintiff and some of his witnesses say the defendant must pen back the water for 16 hours to enable him to grind 7 or 8 hours. Here is a great discrepancy. I shall not attempt, nor is it necessary I should reconcile it. The truth, very likely, is that each party has been more anxious to adapt the facts and stretch his opinions to support his own side of the controversy than to state the exact facts of the case. The point I have to attend to is not in how *short* a time the defendant can accumulate water to enable him to work his Mill, but what restriction it is, under the particular circumstances necessary to impose upon him to prevent his injuring or acquiring a right to do what would be injurious to the plaintiff's right. Now looking at all the evidence relating to the power and peculiarities of this stream, I am satisfied that the time allowed the defendant for penning back the water may be extended without doing any practical injury to the plaintiff's right. From the evidence now adduced for the defendant it appears there are one or two Springs in the plaintiff's dam and also several small tributaries emptying

into the stream below the defendant's Mill, and that from these sources, even when the water is stopped at the upper Mill, a considerable accumulation takes place in the plaintiff's dam during the night. Now I wish here to guard myself against being understood to say that these circumstances would give the upper owner any legal right to cut off the water, or use it in a different manner from what he would have been entitled to do if no such tributaries below him had existed. In other words, I do not conceive it would be any defence to an action against the upper owner to say there are feeders below my Mill which yield sufficient water for yours and, therefore, I have a right to detain the water at my Mill as long as I choose. Every riparian owner has a right to have the whole volume of the water, from the source of the stream to his land flow in its natural course without *essential* diminution or detention, and can maintain an action at law against any one who causes any such essential diminution or detention. But where application, in such cases, is made to a Court of Equity for an Injunction, it, as I have shewn, acts on very different principles; it cannot restrain the plaintiff from insisting on his strict legal rights, neither is it bound, nor will it assist him in a churlish enforcement of them against slight infringements which cause him no practical damnification; and as the interference of the Court at all in these cases, and the extent to which it does interfere, depend on the particular circumstances of each case. Circumstances of this kind are here entitled to consideration and coupled with the plaintiff's remark to *Lowther* and *Clark*, in 1844, shew that a further extension of the time for penning back the water may be properly made. From all the facts of the case, now fully laid open, I think that extending that time from 10 o'clock at night to 6 o'clock in the morning will probably benefit the defendant without at all injuring the plaintiff's right.

With respect to costs, as the plaintiff was correct in bringing this suit, he is clearly entitled to the costs up to the hearing of the motion to dissolve the Injunction, in 1851; but I think he should have been content with that order, and, therefore, I shall not allow him costs subsequent to that event.

The order, therefore, is that the Injunction formerly granted in this case, so far as relates to restraining the defendants, their servants &c, from penning back the water, or interrupting the natural flow of the stream between the

hours of *ten* o'clock at night and *six* o'clock in the morning of each day, be dissolved, but that with respect to all other times it be made perpetual. And further that the defendants do pay to the plaintiff his costs of this suit up to the hearing of the motion to dissolve the Injunction in 1851, including the costs of such hearing and of the service of the order then made, but no further, to be taxed by Mr. *Fergan*, one of the Masters &c.

THE QUEEN *v.* COX.

March 9th, 1858.

Fishery reserves—construction of Township grants.

This was an information filed by the *Attorney General* for intrusion on land called the fishery reserve. The *locus in quo* is situated partly on the shore of *St. Peter's Bay* and partly on the *Morell* river, and forms part of Townships 39 and 40. In 1769 these Townships were granted to *Spence & ors & Fraser*, and in each of these grants is contained the following clause of reservation: "And further saving and reserving for the disposal of Hi Majesty, his heirs, and successors, 500 feet from high water mark on the Coast of the tract of land hereby granted, to erect stages and other necessary buildings for carrying on the fishery." Under this clause the Crown claims 69 acres fronting on the Bay and 69 acres on the *Morell* river, in which the tide ebbs and flows.

On the trial the Jury were directed that under this reservation the land fronting on the Bay was excepted and belonged to the Crown, but that fronting on the river was not excepted and passed to the grantee. The Jury, notwithstanding, found for the Crown for the whole.

The point now to be decided is, whether the 69 acres fronting on the *Morell* river is embraced within the reserve. As many of the grants of Township lands in the Island contain a similar reservation, the decision of the question thus raised is one of considerable importance.

In legal construction the term "sea shore" applies to all land over which the ordinary tides flow and reflow and, as under that definition, wherever a high water mark exists the 'sea shore," in contemplation of law, extends. If the words

"high water mark," in these grants, are construed as designating both the "sea shore" along which the reservations were to extend and also the *point on the shore* from which the 500 feet is to be measured, the land fronting on this tidal river would be clearly comprised within the reservation. But the construction of grants, like other instruments, depends on the intention of the grantor, and a knowledge of the nature or peculiarities of the subject matter of the grant is, sometimes, essential in order to ascertain the sense and meaning in which particular words are intended to be used. The reservation in the grants in question is expressed to be made for the purpose of enabling His Majesty to dispose of the lands reserved for a particular purpose, viz., to erect stages and other necessary buildings for carrying on the fisheries. The object in making this reservation, evidently, was to promote and encourage the developement of a great source of national wealth by affording facilities and conveniences to those who might embark in the fisheries. Along the coasts, on the open sea, and also in the Bays of this Island, very valuable cod and other fisheries exist, in prosecuting which, stages and other buildings covering a considerable extent of ground, are necessary; and on those shores, therefore, such a reservation might prove a valuable privilege to fishermen. But the rivers corresponding to the size of the Island are on a diminutive scale, while from the general formation of the country, the tides ebb and flow many miles up all the rivers and almost to the source of many others. We cannot be ignorant of what every one in the Country knows, that no fisheries exist in those rivers, of a description to require any such extensive reservations to erect stages or other buildings to carry them on. In fact, in such situations the reservation for fishing purposes would be useless. We must not assume the Crown to have been ignorant of the nature of the country it was granting away, and it seems to us that under such circumstances, the clause reserving a certain space from high water mark on the *coast* for the purpose of carrying on a fishery must have been intended to apply only to those parts of the Townships popularly known as *coast*, viz., the shores of the open sea and the bays and inlets of the sea along which only any fisheries existed, for which such reserves could be necessary; and that it could not have been meant to extend to rivers where a large extent of ground would then be appropriated to a purpose for which it could be of no practical use.

But it appears to us, without drawing on our local knowledge of the country, the language of the reservatio itself when taken altogether, will not bear so extensive a construction as is contended for. The words of the reservation are "500 feet from high water mark on the *coast* of the tract hereby granted." Now if the reservation was intended to extend to all tidal rivers, or to every place where the tide ebbed and flowed, why was the word coast used? since the words, 500 feet from high water mark, would have extended to all places where a high water mark could be found. If, therefore, the words, "on the coast," were not intended to confine the description of the premises reserved within narrower limits than the words, high water mark, would have done, they seem to us to have no meaning, or at most, are mere surplusage; but in construing an instrument no words should be rejected if a sensible interpretation can be put upon them. The term coast, in its popular sense is, we believe, applied to the land fronting on the open sea, or inlets off the sea or bays, but is never applied to that fronting on rivers. And taking the word in that sense, it appears to us, evidently, used to contradistinguish high water mark, on what is popularly called the *coast* from high water mark on the *rivers*, and to limit the reservation to the former, and prevent its extending to the latter.

On these grounds, we think the land fronting on *Morell* river is not included in the reserve but passed to the grantee

Another ground on which a new trial is moved for is, that the verdict is contrary to the evidence in finding for the whole 500 feet, whereas a considerable portion of it was proved to have been washed away by encroachment of the sea. There is no doubt that the verdict is contrary to the evidence in this respect. That the sea had encroached to a considerable extent, was proved beyond all question, but the evidence as to the extent of that encroachment, was conflicting. Some of the witnesses estimating it on the average at one foot, and others at four feet per annum. It was admitted by the *Attorney General* that whatever part of the 500 feet had been so lost must be deducted. The Jury, however, found for the whole.

On both these grounds, therefore, we think the rule for a new trial must be absolute.

Several other points were raised, but as they were disposed of during the argument, it is unnecessary now to advert to them.

Rule absolute.

COMPTON *v.* CROSSMAN.

Hilary Term 1860.

Replevin—One seal to a deed by several grantors sufficient if it appears that each intended to use it—Until entry Widow has no right to Dower—Where reserved rent was £5 and a *Ton of hay* and avowry alleged only the money to be due without acknowledging satisfaction for the hay held no variance.

This was an action of Replevin. The avowant claims as heir and it is objected:

First. That the deed to avowant's father has no seal and therefore, he had no estate to descend to avowant. The deed which is for a valuable consideration of £200 was executed in *France*, and is certified by a French Notary on the back under his seal. The same Notary is also an attesting witness and the same seal used by him to his certificate on the back of the deed, is affixed at the bottom of the deed opposite his name, and also opposite the grantor's signature. It is clear that no instrument can be considered a deed unless sealed. But the law does not require the seal to be of any peculiar material or of any particular form. Thus it is laid down 4 *Cruise*, Dig. 28., "that if a party seal a deed with any seal beside his own, or with a stick or anything else, it is equally good." So it was determined in *Virginia* that a scroll used as a seal constituted a good bond, 2 *Tucker's*, Bl. Com., 304. The grantor might therefore use the Notary's seal. But it was urged here that from the position of the signatures it was evident that the seal had been placed by the Notary after his signature as a Notary attesting an instrument. From examination of the instrument I cannot say that such was the fact. But admitting it to have been put there by him for that purpose, that would not prevent the grantor from treating and adopting it as his seal also, and so making the one seal serve as the seal of two distinct parties. *Cruise* Dig. 28, says, "It is not necessary that there be for every grantor who is named in the deed, a several piece of wax, for one piece of wax may serve for all the grantors which are named in the deed if every one of them put his seal upon the same piece of wax, or if another do so for them if the words of the deed imply so much, that is, if it be said in the deed *in cujus rei testimonium* &c., or words to that effect." Now here the attestation clause states that the grantor has signed

sealed &c., and there being a seal which would be sufficient if the grantor chose to use it as such. we cannot disbelieve the declaration in the deed under his signature that he did so. I think, therefore, that the deed is sufficiently sealed.

Secondly. It is objected that the avowant's mother is entitled to Dower, and therefore avowant is only entitled to two thirds of the rent, and having avowed for the whole there is a variance. But until Dower is assigned, a widow cannot enter into the land. Thus *Kent* says, "The widow cannot enter for her Dower until it be assigned her *nor can she alien* it so as to enable the grantee to sue for it in his own name. *It is a mere chose in action* and cannot *be sold*," 4 *Kent* Com. 41. And by *Abbott* in *the King v. Inhabitants of Northweald Bassett*, 2 B. & C. 128. "Before assignment, the widow hath neither *legal* nor *equitable* estate in the land." Neither can she recover arrears of profits or damages except from the time of the demand. The reason assigned for which in *Co. Litt.* 33, A is "because the heir holdeth by title and doeth no wrong till a demand be made and she cannot demand it from a tenant for years, but only from a tenant in fee. *Barton* Convey. 258, 278. And though after assignment she is in of her own estate and considered to hold from the death of her husband, yet, if between his death and the assignment, the heir has received rents from a tenant of premises afterwards assigned for Dower she may compel the heir to account; she cannot compel the tenant to pay again. It is similar to the case where a man seized in right of his wife, makes a lease reserving rent, and where his wife dies without issue by him, whereby he is not tenant by the curtesy, but his estate is discontinued, yet he is entitled to the rent until the heir has made an actual entry, because the lease was good at first, and drawn out of the seizure of the wife and, therefore, until entry of the heir remains good, so that the lessor may distrain and avow for the rent till the heir has entered, *Woodfall* L. & T. 190. So the heir has the legal title to land until Dower is assigned and is, therefore, entitled to the rent. And it is only the heir or person having the freehold that can be called to account for that portion of the rents which he has recovered from the lands which are ultimately assigned for Dower.

Thirdly. It is objected that there is a variance inasmuch as the rent for the last year being £5 and a ton of hay, and the averment only alleges the *money* to be due without

acknowledging satisfaction for the hay. But there is no material variance in this respect. The avowry states the demise reserving the yearly rent of £5 and the ton of hay correctly, but it then alleges £40 to be due for 8 years' rent, and avows the taking for that, without acknowledging satisfaction for the hay. This is no variance, for it is supported by the evidence which shews that though the hay may be due, the £40 is due. In *Starkie* Ev. 970, it is laid down, "that on *non tenuit* the defendant must prove the holding as alleged, and a variance as to the amount of the *annual* rent will be fatal, so as to the days when the rent becomes due. But a variance as to the *quantum of rent due* will not be material, provided the terms of the holding be proved as laid." No doubt an avowry for part of the rent due without shewing how the rent is discharged, is bad, not because of the variance, but because it leaves the plaintiff liable to another distress for the residue, 1 *Saud* 201 N. 1, and this avowry may, perhaps, be defective in that respect. But the defect appears on the face of the plea, and, therefore, should have been taken advantage of by special demurrer, and if it could have been taken advantage of otherwise, justice would require that the defendant should be permitted to enter *remittur damna quo ad* the hay, but I do not think that necessary.

Judgment for the avowant.

CALLIGAN, APPLT. *v.* HOBKIRK, RESPDT.

Hilary Term 1859.

Highway—To constitute right of way by user short of 20 years evidence must shew owner's intention to dedicate—Where A. grants a piece of land to B. and afterwards lays off the residue in Building Lots with Streets for the convenience of his grantees, B. acquires no right to use the Streets.

In this appeal the question turned on a right of way. It appeared that *Peake*, being owner of a piece of land, about 1851 laid out a Street called *Cross Street*, on which building lots were laid off, and in 1853 conveyed one of these lots to defendant. In 1854 *Peake* had a further survey made, when the whole block was laid off, several new streets being run and building lots laid off on them. And it is for removing a

fence placed by the plaintiff (a lessee of *Peake*) across one of these Streets laid off at such last survey in 1854, that the action is brought.

It was contended

First. That the acts of *Peake* amounted to a dedication of the Streets so laid out to the Public.

Second. That, at all events, the defendant had a *right of way* in as much as *Peake's* acts (as between himself and his grantees) amounted to a dedication of a way to them.

As to the first point, I think the evidence clearly shews that there was no dedication to the Public. In determining whether a way has been dedicated to the Public or not, the proprietor's intention must be considered, and if it appears that he did not so intend, no user, short of the period fixed by the Statute of Limitations, can give the Public a right. It was clear here from the evidence, that up to within 3 or 4 years, *Peake* had maintained his fences across the intended Street, but that they had been pulled down either by persons to whom lots had been sold, or, as was stated by *Moore*, *Peake's* man of business, they were removed in consequence of its vicinity to a portion of the City called the "Bog," among the inhabitants of which, according to the witness, in cold weather a sort of fence taking *monomania* prevailed. And that for 3 or 4 years the fences had remained down without being replaced. But the fact of the fences having been for some time maintained *after the laying off the Streets* though afterwards allowed to remain down, so far from shewing an intention to dedicate, is strong evidence against the existence of such an intention. *Roberts v. Kerr* and *Lethbridge v. Winter* 1 Camp. N. P. R. 262, are strong cases on this point. In the former case it appeared in evidence "that some years ago a Street was made over the *locus in quo* which had been before an inclosed field. That soon after the houses were finished a bar was placed across the Street to prevent carriages passing through it, but that the bar was soon knocked down, since which time it had been used as a thoroughfare. On the part of the defendant it was contended that this amounted to a dedication to the Public, at least as a footpath." But *Heath* J. observed that the putting up of the bar rebutted the presumption of a dedication to the Public. Such a dedication must be made openly and with a deliberate purpose. Nor could there be a partial dedication to the Public, although there might be

a grant of a footway only. This Street, he thought, was to be considered merely a way for the use of the tenants inhabiting the houses on each side of it." In the latter case, "to a plea that there was a public footway over the *locus in quo*, and because a gate was wrongfully erected, the defendant pulled it down. It appeared, in evidence, that the gate in question had been recently put up in a place where a similar gate had formerly stood, but where, for the last 12 years, there had been none. It was, therefore, contended for the defendant that from suffering the gate to be down so long and permitting the Public to use the way without obstruction for so many years the plaintiff, and those under whom he claimed, must be considered as having completely dedicated the way to the Public, and the gate could not be replaced. The plaintiff, however, under the direction of Marshall Sergt. had a verdict which the Court of King's Bench, the following Term, refused a Rule *Nisi* to set aside."

As to the second point, as the defendant's deed was granted *before* the *locus in quo* was laid off as a Street, the supposed existence of such a Street could have formed no inducement for his taking the land, and therefore, no implied agreement as between *Peake* and his grantee, to grant him a way through that Street, can arise. I forbear to express any opinion as to what the decision might have been had the defendant's deed been dated after the land was laid off in 1854, and a plan of that survey exhibited to the buyer, because the facts of the case have not rendered a consideration of it, in that view, necessary.

Judgment affirmed.

IN THE MATTER OF COMPTON *v.* POPE.

Hilary Term, 1861.

Redemption of land sold for tax under 11 *Vic.* c. 7, sec. 12—Relation of owner and purchaser—Purchaser not allowed for clearing wild land, nor for cost of new buildings—Purchaser claiming for improvements must prove exactly what each improvement was.

This was an application under the Land Assessment Act, 11 *Vic.* c. 7 s. 12, by the owner of lands sold under the Act for non-payment of tax, to have the amount of redemption

money ascertained, and to compel the purchaser thereof, on payment, to reconvey the premises. The defendant, in his affidavit, in answer to the rule, sets out an account of the amount to which he contends he is entitled, amounting to £19 13s 2d. This amount is composed of different classes of items, on which distinct questions arise. The first class amounting to £5 3s 3d, is composed of the purchase money, expenses and interest, to the whole of which the defendant is clearly entitled unless the special circumstances disclosed in the affidavits, to which I shall presently allude, are such as to render it unjust that he should recover them. The second class of items, amounting to £3 10s, consists of £2 for ploughing and £1 10s for cutting fence poles.

The third class of items, amounting to £11, consists of expenditure alleged to have been made in erecting a house on the premises.

With respect to these two last classes of items, the question arises whether they are of a description which the defendant had a right to make, or for which, if made, he is entitled to compensation from the owner who wishes to redeem.

The 12 sec. of the Act gives the owner of land sold for non-payment of tax a right to redeem within two years on repaying the purchase money with interest, and also *all reasonable* expenses attending the same, and a fair allowance for such improvements as shall be made thereon. The legal effect of this is, that the purchaser takes, not a perfect title, but becomes merely a Statutable Mortgagee of the premises until the expiration of the two years, when (unless fraud or unfair dealing, on the part of the purchaser, can be shewn) the Equity of Redemption becomes foreclosed by operation of the Statute. If this be the legal effect of this clause, the situation of a purchaser of land so sold, so far as his right to allowance for improvement is concerned, is similar to that of any other Mortgagee in possession, and the decisions on similar questions between Mortgagor and Mortgagee become precedents for determining a purchaser's right to allowance for improvements made on land so purchased. Now the general rule of Equity is, that a Mortgagee is allowed for *necessary* expenditure in keeping the Estate in repair, yet he is not allowed for other improvements, such as new buildings, except under peculiar circumstances. In *Powell on Mortgages* 188, it is laid down "that a Mortgagee, before foreclosure

cannot exercise any act of ownership over the property which may incumber the Mortgagor." And Equity will restrain him from committing waste; thus, "where a Mortgagee of an Estate in fee had cut down trees, on application to the Court, it was decreed that an account should be taken of what was cut down and the produce applied, in the first place, to the payment of the interest, and then to the sinking of the Mortgage, and an Injunction was granted to stay the felling of any more. But a distinction is made where the security is defective, for in that case the Court will not restrain the just creditor from his legal privileges, but then the timber cut down must be applied to ease the Estate and not to the Mortgagee's benefit. Nor can he open pits for gravel, peat, or coal &c, *nor change the courses of husbandry* (Note P.)

But although a Mortgagee cannot do any act to incumber the Estate Mortgaged, yet he will be entitled to such expenses as he shall incur in *necessary repairs*, or other acts for the preservation of the Estate Mortgaged, and may add this to his principal debt, 1 Pow. 189. And in 2 *Powell*, 956, Note 2, where the cases on this subject are considered, it appears that where allowance is claimed for improvements it must be shewn that they are necessary. Thus in *Marshall v. Case* there cited, where the building being in a very dilapidated condition the Mortgagee rebuilt the kitchen, pantry &c, and double roofed the house which before was single roofed, he was allowed for the improvements, the *Vice Chancellor* saying "this Mortgagee has not made *new buildings for new purposes*, he has only erected new buildings on the *site of the old* and for the same *purposes as were served by them*. The new buildings are merely substitutes for those which are too ruinous to be any longer useful."

Chan. Kent, Vol. 4, page 166, thus sums up the doctrine. "A Mortgagee in possession is, likewise, allowed for necessary expenditures in keeping the Estate in repair, and in defending the title. But there has been considerable diversity of opinion on the question, whether he was entitled to a charge for beneficial and permanent improvements. *The clearing of uncultivated land*, though an improvement, was not allowed in *Moore v. Cable* on account of the increasing difficulties it would throw *in the way of the ability of the debtor to redeem*. But lasting improvements in building have been allowed in *England* under peculiar circumstances, and they have been sometimes

allowed and sometimes disallowed in this country." In *Russel v. Blake*, cited in Note c., it was said that the Mortgagee could not be allowed for making anything new, but only for keeping the premises in repair. All the cases agree that the Mortgagee is to be allowed the expenses of necessary repairs and beyond that the rule is not inflexible, but it is subject to the discretion of the Court, regulated by the justice and equity arising out of the circumstances of each particular case.

Now the building for which the allowance is claimed in the present case is entirely new. No necessity for its erection is shewn, though the building might be a convenience to a person working the land and enable the occupant to realize more from it, yet this was not necessary as the land was surely a good security for the 50s paid for it. And we think, therefore, that this is not an improvement for which the purchaser is entitled to remuneration from the owner. To give the word "improvements" the comprehensive construction contended for, would open a wide door to injustice and oppression. A valuable farm or tract of land (as in the present case) may be bought in for 50s. The purchaser, for the very purpose of rendering redemption difficult, or impossible, immediately sets to work to erect valuable buildings, or clear up a large tract of land. But the owner may not have wanted either land cleared or buildings erected on it, and, therefore, though a large amount may have been expended by the purchaser in making them, they may be of no value to the owner, or if they are, his circumstances may be such as to render it impossible for him to redeem, and the consequence would be that he must lose his land in the one case, or pay for what is of no value in the other. We cannot suppose the Legislature intended the Act should have so unjust and oppressive an operation. In construing acts, regard must always be had to the law existing at the time of their enactment, of which the Legislature is presumed cognizant. And where a new Act, by its operation, may create privities, or relations between individuals, without their consent, similar to those which at its passing were usually created with their consent, it is but reasonable to suppose it was intended that the Statutory convention should confer similar rights, and that the rules of law which governed the rights of the parties under the voluntary contract should apply to the Statutory contract also. And as the position of a purchaser of land, sold under this

Act, is clearly that of a Mortgagee, we think the improvements contemplated by the Act, and for which a purchaser is entitled to allowance on redemption, are (like those allowed to other Mortgagees in possession) such as keeping buildings in repair, repairing fences &c, and then only when it is shewn that they were necessary to be done.

With respect to the claims for ploughing and fencing, cases may, no doubt, arise where such a claim is admissable. But a Mortgagee cannot use the land in a materially different manner from that in which the Mortgagor used it. Thus it has been decided that "*he cannot change the course of husbandry.*" Now before a purchaser can charge for preparing land for a crop and fencing, he must, we think, shew that the land had before been cultivated. But the affidavits are silent on this point, and, for ought that appears, the land prepared for crop may have been waste land which the owner never used and may have no intention of using for that purpose. Again, with respect to this claim, the account merely states £2 for ploughing and 30s for cutting fence poles, and then the affidavit states that the defendant has laid out a considerable sum in improvements &c, amounting to £19 13s 2d, "*the particulars of which are set forth in the account hereunto annexed.*" But we think this mode of allegation entirely too loose and uncertain. The defendant is to have a *reasonable* allowance for preparing the land, but before the Court can say what is a *reasonable allowance* it must be informed of the *quantity* of land prepared, and of what the preparation consisted. Forty shillings may be a very reasonable demand for manuring and preparing one acre, but it may also, be a very unreasonable demand for preparing three or four in a different manner. Then again, with respect to the fencing, *how much* was cut is not shewn, nor whether it was placed on the land and remains there for the owner's use. Consistently with the allegation it may still remain in the woods where it was cut.

Another ground for disallowing the defendant's claim for improvements is, that it appears by his affidavit that at the time the tax for which the land was sold accrued due, *he himself* was in possession of the whole under an agreement for sale, and also of a life estate in a third part, under a conveyance from the plaintiff's mother of her Dower. If such was the case, it was his duty to have paid the tax. Under these circumstances, his allowing the land to be sold and

himself becoming the purchaser, we must attribute to his having discovered, perhaps shortly before the rule, that he had unintentionally omitted to pay the tax. Had he intended to use the title so acquired against the infant owner, we must presume that he would have given notice of his intention to do so, that she might resist the claim under the deed, or redeem it before it was incumbered by expense for improvements, which he does not appear to have done. Such being the double right, or character under which the defendant held possession, it is but reasonable to suppose that he made the improvements in his rightful character as owner of the Dower or vendee in possession, rather than that of purchaser under the Sheriff's deed, the clothing himself with which, (under the circumstances) if *intended* to be used against the owner, would be an act of more than doubtful propriety.

As to the £5 3s 3d, being the purchase money and expenses, there could be no question of the defendant's right to this, but here it appears that he was in possession of a third at least as owner of the Dower. If the land had been purchased by a stranger, one third of this amount would have had to be paid by him to save his life Estate as tenant of the Dower and, therefore, as he himself has become the purchaser he can have no claim for it against the owner of the Reversion. One third, therefore, of the £5 3s 3d must be deducted from his claim, which will leave £3 8s 10d to be paid to him by the plaintiff, upon payment of which she will be entitled to a reconveyance.

The order will, therefore, be, that upon the plaintiff *Lisle Ann Compton*, paying to the defendant, *James C. Pope*, the sum of £3 8s 10d, he do execute a reconveyance of the lands and premises called *Wellings Point*, situate on Township No. 17, mentioned in the affidavits read on the hearing of this cause and stated in the affidavit of the said *James C. Pope* to have been conveyed to him by Sheriff's deed, dated the 26th day of October 1858. And it is further ordered, that in such conveyance a proviso shall be inserted to the effect, that such conveyance shall not in anywise prejudice, effect, or make void any right, or claim which the said *James C. Pope* may have to the Dower, or thirds of *Maria Ann Compton* in the said affidavits mentioned.

DOE DEM WIER *v.* SHAW.

Hilary Term, 1861.

Judgment as in case of nonsuit—Plaintiff must shew that the not proceeding to trial according to Notice was not caused by his own negligence.

This was a rule to shew cause why Judgment, as in case of a nonsuit, should not be entered.

The plaintiff gave notice of trial for *July* Term 1854 at *Georgetown*. The plaintiff, in his affidavit, states that the Chief Justice having been, while at the bar, concerned in the cause, could not try it, and that he, supposing Mr. Justice *Peters* who was then absent, would not return in time, countermanded the notice of trial, and he contended that for this reason the cause must be considered as if made a remanet, and, therefore, the defendant cannot have judgment as in case of a nonsuit, but must proceed to trial by Proviso. Without expressing any opinion as to whether the *English* rule that where a cause becomes a remanet this motion cannot be made, I am clearly of opinion that this cannot be considered to have been made a remanet in July 1854, as the plaintiff himself countermanded his notice of trial and, therefore, on the first day of the Term was not in a position to try it if it had been called on. It appears by the defendant's affidavit that notices of trial have been given in July 1853, March 1855, July 1855, July 1856, March 1858, July 1858, besides notices for July 1854, March 1857, and July 1857, and yet the plaintiff has never proceeded to trial. The plaintiff in his affidavit states as an excuse for July 1856, March 1857, and July, 1857 that *Lemuel Cambridge*, a material witness for the plaintiff, was unable to attend, and that in July 1858 and March 1858, the cause could not be brought to trial owing, partly, to want of access to a certain deed referred to by the said *Lemuel Cambridge* which could not be discovered, and partly owing to other reasons which cannot be dislosed without great prejudice to the plaintiff. Now the facts stated as an excuse for not proceeding to trial must be such as to satisfy the Court that the plaintiff's delay arose, not from a wish to delay the trial, or from negligence, but from necessity, or some other just and reasonable excuse. Now looking at the facts stated in these affidavits, I cannot say this appears to be the case. Since 1855 to 1860, a period of 5 years has elapsed,

a time, one would suppose, sufficient to find a deed if it could be found. And as to *Cambridge*, if he was too ill to attend, his evidence might have been taken *de bene esse*. It is impossible not to see that great delay (whether from neglect or intention) has taken place, and I, therefore, think this rule should be absolute.

Rule absolute.

CRESWELL v. HUNT.

Hilary Term 1862.

Sheriff's fees—Sheriff levying on land under Execution not entitled to poundage if debt paid to plaintiff before day of sale—*Quaere* if entitled to poundage where land levied on in any case unless he receives and pays the money.

This was an appeal case. The plaintiff, Deputy Sheriff of Prince County, had an execution at the defendant's suit under which he levied on goods which produced on sale £27. But on the fees respecting them no question arises. The plaintiff also extended the execution on some land, the defendant settled the debt, the land was not sold, the plaintiff brought his action in the Commissioners Court for his expenses *and poundage*. The Commissioners gave judgment for the expenses, viz., travelling and advertizing, but refused to allow the poundage, and from this judgment the plaintiff appeals.

It is, by the *English* practice, well established that when on a *Fi. Fa.* the Sheriff levies, and the parties compromise before he sells, he is, notwithstanding, entitled to poundage. But the *English* cases arose on the 29 *Eliz.* cap. 4, which provided that for executing any extent on the body, goods or lands, the Sheriff shall have so much for every 100 l. shall so levy, or *extend and deliver in execution*. The moment the *levy* on goods is made the Sheriff's right to the poundage, by the express words of the Statute, attaches.

Here the Sheriff's right to poundage rests on the Island Act 16 *Geo.* 3, cap. 1, which provides that "for levying, *paying and receiving* all monies upon execution," he is entitled to poundage. Now under this Act it might be doubtful whether the Sheriff, in any case, would be entitled to poundage until he had not only levied, but paid over the money. But

the practice has, with respect to goods levied on, been otherwise and in such case as the Sheriff must take possession of the goods and thereby incur trouble, risk and responsibility for which, except from the poundage, he would have no remuneration, the authority of *Alchin v. Wells*, 5 T. R. 470, might be held to apply.

But the right to take lands in execution for debt is given by 26 *Geo.* 3 c. 9, which provides "that when there is not sufficient personal estate whereon to levy, the Sheriff shall *extend* the execution on the real estate of the debtor," and, after taking certain steps, "shall sell so much of it as will discharge the execution with *costs* and *charges*" Nothing is said about poundage only the costs and charges, which can only mean the fees for travelling, posting notices, and other incidental expenses.

Again, where the Sheriff levies on goods, he has not only a right, but it is his duty to take them into his possession, and to sell them, by which risk and trouble is incurred. But when he merely *extends* an execution on land he takes no possession; for by the 4 sec. it is provided "that the Sheriff or his Deputy shall on no account disturb any person or persons in possession of lands, or tenements, at the time he shall levy execution thereon, but shall leave each person or persons in the peaceable possession thereof until final sale shall be made as aforesaid." Neither does the levy give him any immediate right to sell. He must advertize it for two years, during which time the defendant remains in possession, and before the expiration of which he may pay the debt. The case is somewhat analogous to *Graham v. Grill*, 2 M. & S. 296, where under a levy on a *capias utlagatum* where no *venditioni exponas* had been issued, a claim for *poundage* was made. Lord *Ellenborough* says, "but is there not this difficulty here that there has been no levy of the money, and, therefore, supposing a *capias utlagatum* to come within the words, extent or execution, on the Statute of *Elizabeth*, must not the *money* be *levied* in order to entitle the Sheriff? The right of the Sheriff to poundage is a right merely *positivi juris* and, unless especially conferred by Act of Parliament, he cannot claim it. The *capias utlagatum*, in its original form is, for the punishment of the party's contumacy, and not for payment of the debt." So here the extending execution on the land does not empower the Sheriff to sell or in any way to meddle with

the land, but merely to take certain preparatory steps which will authorize a sale at a future period. Substantially the whole proceedings of the Sheriff seem to amount to nothing more than a Notice by a Mortgagee under a power of sale that the land will be sold on a certain day unless the debt and expenses be sooner paid.

Looking at the whole of the 26 *Geo.* 3, I am of opinion that under its provisions the Sheriff is not entitled to poundage even where he sells, and that before he can claim under 16 *Geo.* 3, cap. 1, he must receive and pay over, or (at least by the arrival of the period of sale) be in a position to do so which was not the case here.

The consequence of holding the mere extending the execution on land to vest a right to poundage, would be most serious against debtors, and such as, I think, the Legislature never contemplated. An execution for £5000, money lent and secured on land on a Judgment (a very common occurrence) might issue, and the debtor a month after, may raise the money to pay off the security. All that the Sherift had done would have been to travel a few miles and post some advertisements, for which specific services he is paid, yet if his right to poundage attaches on the levy, the debtor would have to pay many pounds to the Sheriff besides the debt, costs and expenses.

The appeal must be dismissed with costs.

BLACK v. SHAW.

Hilary Term 1862.

Absent Debtor Act—Summons to Trustee or Garnishee must be served by Sheriff—none but defendant in the suit can take advantage of a mere irregularity—but a stranger may object to irregularity which renders proceedings void.

In this case an attachment at the suit of *Vaux* having issued against the defendant, an absent debtor, no goods being found to attach, a summons was issued against *McNutt* as trustee or garnishee, which was served by the clerk of the plaintiff's Attorney. A summons was, subsequently, served on *McNutt* by the plaintiff, *Black*, also an attaching creditor, by whom motion is now made to quash the summons, on the ground that it could only be legally served by the Sheriff.

It is contended in reply, First. That the clause in the Act 20th *Geo.* 3, cap. 9, is only directory, and that the service by the clerk is good.

Secondly. That supposing it bad, the objection can only be taken by the defendant, *Shaw*, and not by another attaching creditor who is no party to the proceedings objected to.

The 2 sec. of the Act provides that where there are no goods to attach, the plaintiff may " file a declaration against such absent or absconding *person* and also cause the trustee of such absent person to be served with a summons out of the clerk's office, being annexed to the declaration 14 days previous to the sitting of the Court, which, being *duly served*, and *return being duly made thereof, under the hand of the Sheriff, or his deputy*, shall be sufficient in law to bring forward a trial without any other or further summons."

The Act, in very clear language, requires two things to be done to bring forward a trial. First, service of summons and declaration, and secondly, due return of service under the *hand of the Sheriff*. The last requisite is here wholly wanting, and we are, therefore, clearly of opinion that there is nothing on which the proceedings by *Vaux* against the trustee, *McNutt*, can be maintained.

The other point, that the objection cannot be taken by another attaching creditor, raises a question of considerable importance on the practice under this Act.

On this point much reliance was placed by Counsel in opposing the motion on American authorities.

In *Drake*, on *Attachments*, 772, it is laid down that " whatever irregularities may exist in the proceedings of an attaching creditor it is a well settled rule that other attaching creditors cannot make themselves parties to these proceedings for the purpose of defeating them on that account."

Cambeford v. Hall 3 McCord 345, decided in *South Carolina* (where under a Statute which declared that every attachment issued without Bond is void, it was held that the garnishee could not take advantage of the insufficiency of the Bond) was cited from a written copy of the Report. But on turning to *Drake* 715, where this case is cited at length, I find other decisions under the same circumstances to the contrary. Thus in *Ford v. Woodward*, decided in *Mississippi* under a Statute which declared that every attachment issued without bond and affidavit taken and returned is illegal and void. and

shall be dismissed; it was held on a Writ of Error sued out by the garnishee, that a judgment against the garnishee where such bond and affidavit had not been taken and returned was erroneous *because the proceedings* against the defendant *were illegal and void.* In *Louisiana, Missouri* and *Alabama* the decisions seem to concur with *Cambeford v. Hall.* But in a subsequent case, *Bank of Mobile v. Andrews,* an attachment for want of an affidavit and bond was quashed at the instance of the garnishee. From this review of the American decisions there appears as many authorities in favor of the application as against it.

Creighton v. Daniels decided in *Nova Scotia,* James Rep. 347, where it was decided that a defect in the return day of the writ could not be set aside, except at the instance of the defendant, appears from the language of Judge *Bliss* to have turned on the particular words of the Colonial Statute which differ from ours. He says, "two cases are specified by the Statute in which a subsequent attacher, or other person interested may apply to set aside the proceedings, and they are the two strongest cases that can be imagined, and in which, if in any case, no enactment would be required. We may, therefore, reasonably infer that the Statute did not intend that any other objection should be taken.

I quite concur in the general position laid down by *Drake* that *irregularities* can only be taken advantage of by parties to the suit. The same doctrine is laid down by *Archibold* and other *English* books of practice. In general it is only the opposite party, or his representatives, or those claiming under him, that can take advantage of the irregularity, and strangers to the proceedings cannot do so. The reason for this rule is first, that a mere stranger having no interest would not be heard in any case. But even a stranger who has an interest cannot do so, because the defendant may waive the *irregularity,* and, therefore, a stranger cannot interfere to complain of that to which the defendant may elect to submit, and by doing so cure the defect. But there is a great difference where the proceeding is that pointed out by the Practice of the Court and the error is merely in the manner of taking it, and where the proceeding is altogether wanting, or different from that which is required. In the first case it is merely an irregularity which the opposite party may waive. In the other it is a nullity which no act or consent of the opposite party can cure

Now the objection here is, that the Sheriff's return of the service of the summons and declaration, which is matter of record on which the subsequent proceedings are founded, is *wholly* wanting. This, therefore, is an error which the defendant himself could not waive, and without it all the subsequent proceedings are void.

It was argued that the garnishee did not object to the informal notice, but he could no more waive the error so as to cure the nullity than the defendant could.

With respect to the garnishee's right to object to irregularities, *Drake*, 741, says, "the decision of this point depends mainly on whether the defect or irregularity be such as would prevent the garnishee from pleading the judgment against him in bar of a subsequent action by the defendant for the debt in respect of which the garnishee was held liable. There could be no propriety in rendering a judgment against a garnishee which would not protect him from a second payment of his debt to the defendant, while there could be still less in permitting him to defeat the plaintiff's action by assuming a ground which the defendant either did not consider available to himself or *chose to waive.*"

Now, in this case a judgment against the garnishee must shew the Sheriff's return, and a plea founded on a judgment which did not would be bad, and so, according to the principles laid down by the *American* Commentators, this motion, if made by the garnishee, might be maintained. There seems the strongest reason for the Court's interference at the instance of a subsequent attaching creditor who, as in this case, has obtained judgment in the attachment suit. Such judgment gives him a lien upon the funds in the hands of the Court or garnishee for distribution. The principle drawn by *Nesbit* in *Smith v. Gettinger*, cited in *Drake* 775, after a review of the *American* decisions, as established, is that the attachment and also the judgment, may be vacated at the instance of other creditors for fraud, or for *anything that amounts* to fraud upon *the rights* of other creditors. And at page 780, "according to the course of decisions in some of the *New England States*, there are other cases in which attachments will be held to be dissolved as to subsequent attaching creditors by the action of the plaintiff. Each attacher has a right to the surplus of the defendant's property after satisfying the previous attachments, and any act of an attaching creditor which increases the

demand upon which he attached as *it is*, in *effect*, a fraud upon the subsequent attachers, is in those States regarded as dissolving his attachment as to them. Thus the filing a new Count to the declaration which does not appear by the record to be for the same cause of action as that originally sued on will produce this result."

Now whether the funds for distribution are sought to be claimed through any collusion with the defendant, or under *the pretence* of a judgment or *proceeding* which the *Court see is void*, and which, therefore, confers no right on the party claiming to participate in the distribution of the funds makes, I think, no difference, the one being as invalid and injurious as the other on the rights of other creditors whose proceedings are valid; and if the mere addition of a new count to the declaration is held *in effect to be* a fraud on subsequent attachers, it is difficult to perceive why an attempt to claim the fund under a void proceeding should not be equally so. The true rule in these cases appears to me to be that where mere *irregularity* exists which may be *waived* by the defendant. other attachers cannot move to quash the proceedings. But where the error renders the proceedings a *nullity and void* and cannot, therefore, *be waived by the defendant*, there a subsequent attacher *who has obtained judgment* may move to quash the proceedings.

Another ground on which we think this motion may be maintained is, that the judgment against the defendant in the principal suit gives the attacher a lien on the funds in the garnishee's hands and, therefore, *quo ad* the amount of his claim, places him in the defendant's shoes with respect to those funds. He is, therefore, a privy in interest, and as such authorized to point out defects in proceedings which affect those funds.

This Rule must be absolute

WOOD v. GAY.

Hilary Term, 1862.

Absent Debtor Act 20 *Geo.* 3 c. 9—In suit commenced by attachment against absent debtor plaintiff must bring cause to trial at third term, or obtain leave to continue it—otherwise suit discontinued.

In this case the question is, first, whether an attachment under 20 *Geo.*, cap. 9, and all subsequent proceedings is not dissolved by the plaintiff neglecting to bring the cause to trial at the third term without having obtained leave to continue it another. And secondly, whether a motion to set aside such proceedings can be made by a subsequent attacher who tried his cause and *obtained judgment at* the third term.

The Statute, after providing that the agent may be admitted to defend, provides "that at the third term, without special matter alleged and allowed in bar, abatement or *further continuance*, the cause shall *peremptorily* come to trial." This language, that the cause shall peremptorily come to trial at the third time, unless in consequence of special matter alleged a continuance be allowed, seems to shew an intention that without such special matter alleged and allowed no continuance shall be granted. Before the Statute of jeofails any lapse or want of continuance was a discontinuance of the suit, put the parties out of Court and compelled the plaintiff to begin *de novo*, *Tidd's Pra.* 733. A mere continuance by imparlance *vicecomes non misit breve* or *curia advisare vult* is, however, laid down to be a mere matter of form, and may be entered at any time, and it is said may be made by the Attornies in their chambers, *Tidd's Pra.* 161, and the want of such a formal continuance is cured after verdict or judgment by the Statute of Jeofails. But is the continuance mentioned in this Act a mere form such as those the Statute of Jeofails was intended to cure? It seems something of a very different nature. It cannot be made by the Attorney at his chambers, nor in the Court unless with express leave of the Court granted on express application. How could *Haszard* make up his judgment without the Record shewing a continuance at the third term, and how can the officer insert this in the Roll when none was granted?

In *Rex v. Ponsonby*, 1 Wils. 303,, in Error. In making up the Roll the entry of a continuance by *curia advisare vult*,

and day given by Court in *Easter* Term following, skipped over two terms, viz., *Michaelmas* and *Hilary*, and entered judgment of *Easter*. This was held a discontinuance until amended, and as there was nothing in the Court of Error to amend by, the Court could not insert it. *Dennison*, Justice, says this discontinuance is fatal on demurrer, and there is no Statute of Jeofails that will help it. For ought we know there may be a Record in *Ireland* that will make it complete, and, therefore, we can grant a *certiorari* to inform the conscience of the Court before we give judgment, but after a Record is sent hither this Court cannot amend it without something *to amend by*. Now suppose *Hazzard* moved for leave to amend his erroneous judgment, what would there be for the Court to amend by? Where it was a *mere form* the Court could (if it were necessary) grant leave to amend the Roll by entering a continuance. But how could the Court entertain a motion on the ground required by the Statute of *special matter alleged* at the third term, when its records shew that no such special matter was alleged, and no motion to continue the cause made?

The practice has always been where a plaintiff was not ready to try at the third term, to move for leave to continue.

The Statute gives extraordinary power by authorizing a plaintiff to deprive the defendant of the control of his property before the legality of his claim has been established by judgment, and also postpone the claims of subsequent attachers until the first is disposed of. The tardy prosecution of his suit by a prior attacher, may be injurious, not only to the defendant, but may delay others in obtaining satisfaction of their judgments. The policy of the framers of such an Act must be to enforce speedy and effectual prosecution of his suit by a party seeking to avail himself of its extraordinary power. In similar Acts in the *United States* this is sought to be obtained by requiring a bond with security from the plaintiff, for the prompt and effectual prosecution of his suit before the attachment issues. No such security is provided by our Act, but the Legislature seems to have intended to provide one by compelling the plaintiff to have the validity of his claim determined at the third term unless he shews special circumstances to induce the Court to grant him further time for doing so. And, we think, that in this case, *Hazzard* having failed to do either, his suit is discontinued and his attachment dissolved.

As to the second point, on the principle we have just laid

own in the previous case of *Black v. Shaw*, as the defect here renders the whole proceedings void it is clear the subsequent attacher, *Wood*, may make the application.

The Rule will therefore, be, that the attachment and all subsequent proceedings at the suit of *Hazzard* against the defendant, so far as the same relate to, or in anywise affect the attachment and proceedings of the plaintiff, *Wood*, be set aside.

M'KEAN & SUTHERLAND v. M'KENZIE.

Hilary Term, 1862.

Absent Debtor Act—A non-resident who comes for a temporary purpose to this Island, and while here conceals himself to avoid arrest at suit of a plaintiff resident in *Nova Scotia*—is an absconding debtor within 20 *Geo.* 3, cap. 9—and such plaintiff may proceed against him by attachment.

In this case a motion is made by the defendant to quash an attachment issued against his property under the Absent Debtor Act. From the affidavits it appears that both the plaintiffs and defendant are residents of *Nova Scotia*, and that the note of hand on which the action is brought was given in that Province. It also appears that the defendant owned a schooner, and was in the habit of trading to this Island, and, in November last, while here with his vessel, a Bailable Writ was issued against him at the instance of *James N. Harris*, the plaintiffs Agent in this Islandt to recover the amount of the note. It is sworn by *McQuaid*, a person in the employ of *Harris*, who was sent with the Sheriff to point out the defendant, that he could not then be found, and that he again accompanied *Collins*, an officer for a similar purpose, and that deponent believes that the defendant concealed himself many days to avoid arrest; and there appears little doubt, from the affidavit of this deponent, and also from an affidavit of the plaintiff's Attorney, that the defendant, when applied to for the payment of the note, led *Harris* to believe that he would pay it out of the proceeds of his vessel, but that having sold her to Yates (who is also summoned as garnishee) he secreted himself to evade arrest. The Sheriff having returned the writ *non est inventus*, on the 25th of March, the plaintiffs issued an attachment and summoned *Yates* as garnishee. There is no affidavit of the

defendant denying concealment to evade arrest. The motion is made on the ground that both plaintiffs and defendant being non-residents, and the debt contracted abroad, they are not within the provisions of the Absent Debtor Act. Two questions are thus raised which require to be separately considered.

First. Whether a person, not a resident of the Island, can proceed by attachment for a debt not contracted here. Second-Whether the defendant, also a non-resident, but here for a temporary purpose, is, under the circumstances of this case, liable to be proceeded against.

Numerous decisions on this, and various other points, may be found in the *United States* Reports. But although each State has its Absent Debtor Act, scarcely any two of them are exactly similar; while in most, specific provisions for particular cases leave less room for the application of general principles in their construction than is necessary in the more brief and general enactments of our Statute. Thus in *Virginia*, attachment is held to lie where both plaintiff and defendant reside out of the Commonwealth. In *Ohio*, it lies for any creditor whether he be a resident or not, 2 *Kent* 203. Reliance on such decisions would be more apt to lead to error than to assist, and I think on such points, at least, the safer course is to apply the ordinary rules of construction to our own Statute, and by that means endeavor to ascertain its intention.

The Act provides that any person entitled to any action (meaning of course a right to maintain an action in the Courts of this Island) for any debt, or demand against any absent or absconding person, may cause his goods and estate to be attached. Now the payee of a Note made abroad is as much entitled to maintain an action against the maker, if he happens to find him here, as if the Note were made to a resident payee, and, therefore, if the conduct of the debtor has been such that a resident creditor could attach, it appears to me clear that a non-resident, even if he has never been in the Island, may do so also. In such cases the residence, or non-residence of the plaintiffs, as well as the locality of the debt are, it seems to me, wholly immaterial. The only question being, *could the plaintiff maintain an action against the defendant in this Court* if he found him here? And if he could, has the defendant's conduct brought him within the provisions of the Act? To hold non-residents in such a case to be under a disability, which did not attach to residents, would be open to

this monstrous consequence, that if goods were supplied in *Nova Scotia* and the debtor brought them here and then conducted himself so as to become liable to attachment, the goods of the non-resident creditor might be attached by residents here, while the *Nova Scotia* creditor would be debarred from having recourse against them for his demand.

Whether attachment will lie by an inhabitant on a debt contracted here against a debtor *who has never been in this Island*, is a question not now necessary to be considered. It is clear that in such a case a non-resident plaintiff for *a debt contracted abroad* could not attach, because *the defendant never having been within the jurisdiction*, there never *was a time* when the ordinary process of our Court could be served on him, and, therefore, there never was a time when such a plaintiff could (without the aid of this Statute) commence *an action against him in this Court*, and whatever the intention of the Legislature for the protection of its own citizens, on contracts with foreigners, might be, to hold that it intended to give our Courts power over parties and contracts never within the limits of its jurisdiction, would be to ascribe an intention to exceed its authority. This was the case in *Kenny v. Liddle & Low*, decided by the late Ch. J. *Jarvis*.

The plaintiffs in this case being entitled to proceed under the Act, the next question is, was the defendant an absent or absconding debtor within the intention of the Act?

The Act mentions two cases. First. That of absent debtors Secondly. Absconding debtors. The clause in the second section directing service of the declaration at the last place of above, of inhabitants, or "persons" *who have for some time* had their residence in the Island, shews that it contemplates the case of non-residents as well as of resident inhabitants absenting themselves. But whether it intended to include persons who have *never been here*, as well as persons *here only for a temporary purpose*, is not so clear nor is it now necessary to decide. Neither is it necessary to decide whether a person here only for a temporary purpose, and *merely absenting* himself by departure from the Island without *intention of delaying his* creditors, can, *after* his departure, be proceeded against under the Act, on a contract made abroad by a creditor also a non-resident, who took no steps against him while here. The question in this case being, whether the defendant did not, by

his conduct while here, bring himself within the Act as an *absconding debtor*.

Drake, p. 72. defines an *absconding debtor* to be one "who with intent to defeat or delay the demands of his creditors *conceals himself* or *withdraws himself* from his usual place of residence, beyond the reach of process." Departure from the country is necessary to constitute a man an *absent* debtor. But departure, though frequently an incident, is not necessary to render *absconding* complete. This is clearly admitted by all the Judges of *Nova Scotia* in *Staples v. Taylor*, James Rep. 320. *Drake*, in treating of what constitutes abscondency, comes very near the particular case we are considering; he says, p. 73, since concealment or withdrawal from one's abode *with intent*, before mentioned, seems to be a necessary element of absconding, it cannot be said of one who resides abroad and comes thence into a particular jurisdiction, and returns from that jurisdiction to his domicile, that in leaving the place which he had so visited, he was an absconding debtor. And under a Statute authorizing an attachment against any person absconding or concealing himself so that the ordinary process of law could not be served upon him, it was held that only *residents* of the State who absconded were within the scope of the law, and that an attachment would not lie for that cause against one who had not yet acquired a *residence* there."

In *Alabama*, however, it has been held that upon affidavit that the defendant "*absconds* or *secretes* himself so that the ordinary process of law cannot be served upon him, an attachment will lie though the defendant is a *resident of another State*, and was only casually in the State of *Alabama*."

Here again on Statutes precisely similar are the decisions directly contrary to each other, so that little assistance can be derived from them in determining the point.

The Act clearly contemplates non-residents, in some cases, coming within scope. Now, (whatever doubt may exist, whether a person coming here merely for a temporary purpose and returning home without notice of any proceedings against him comes within the Act) it appears to me clear that if such a person, *while here*, commits an act of *abscondency* by *secreting himself* to avoid arrest, he comes within the express words of the Act as an absconding debtor. And we think that as the plaintiffs in this case had a right to bring their action against the defendant while here, and commenced it by issuing a

Capias against him which he evaded by concealing himself, he committed such an act of abscondency as is contemplated by the Act, and, therefore, the plaintiffs attachment must be sustained.

Rule discharged.

SULLIVAN *v.* RAMSAY.

Easter Term 1862.

Land Tax Act 11 *Vic.* c. 7, sec. 12—Supreme Court has large power in ordering redemption of lands sold under Act—Purchaser under Act stands in position of Mortgagee in possession and cannot clear land or commit waste &c.

This is an application to redeem land sold for non-payment of tax under 11 *Vic.* c. 7, s. 12. From the affidavits it appears that the defendant claims £11 6s 8d, and that the plaintiff tendered £6.

It is objected, first, that this Court has no jurisdiction, and that the plaintiff must resort to Chancery for relief. The 12th section of the Act provides—That where lands are so sold an "Equity of Redemption" shall be open to the former owner or proprietor for 2 years from the day of sale, such owner or proprietor repaying the purchase money with lawful interest thereon, and also all reasonable expenses attending the same, and a fair allowance for such improvements as shall be made thereon, "*the same, in case of a dispute, to be ascertained by the Supreme Court.*

Mr. *Palmer* presented this point in a very brief, but lucid manner, when he observed that this clause must give the Court very extensive or very limited powers. He contended that its power was of the latter kind, very limited. That it had no original jurisdiction. That the application must first be made to chancery, when, if the amount of the claim is disputed, an issue may be directed to this Court to ascertain the amount.

Now if this Court had no original jurisdiction, what proceedings must be gone through with before a case could be decided? A suit must be brought in Chancery. Then if there is a dispute about the value of improvements or expenses, an issue must be sent to this Court. Here a trial

must take place. The result must be certified back to the Court of Chancery before it can be in a position to decide. All this tedious and expensive machinery must be put in motion to decide a matter of £5 or £10.

The policy of our Legislature has been to provide for the determining controversies involving small amounts, in a summary manner, and, therefore, if the intention were more doubtful than it is here, we should pause before giving a clause so general in its terms, an operation contrary to the ordinary spirit of the Legislature on such subjects.

Besides, if the Act contemplated an application to Chancery in the first instance, why is the Supreme Court mentioned? Its only office, according to the argument, is to decide the *quantum* of value, or expenses on an issue. But the Court of Chancery, in the exercise of its ordinary jurisdiction, can always direct an issue to be tried in a Court of law for its assistance. Therefore, unless the words "*the same in case of dispute to be ascertained by the Supreme Court,*" were intended to give this Court original jurisdiction, we must hold them to be mere surplusage. But in construing Statutes, the Court are (if possible) to avoid rendering any word or sentence superfluous or insignificant. Whether in a case where, through some fraud or contrivance of a purchaser, an owner is induced to let the period for redeeming go by without a tender or offer to redeem, this Court would have jurisdiction, may be a question. In such case the plaintiff's right of action or suit, would rest on *fraud* rather than on the Act, and a resort to Equity *might* then be necessary, but we express no opinion on this point.

Another question is raised on a charge for improvements. The land appears in a wilderness state. The purchaser, in his affidavit, states that he made improvements to the value of 40s in cutting away spruce bush on the land. This same question was decided in the case of *Compton v. Pope*, and as after fully considering the arguments and authorities offered at the bar, we see no reason to doubt the correctness of that decision, it is unnecessary to enter now at length into reasons which were then stated. The construction contended for would permit the perpetration of great wrong, Now, though where the meaning is plain, *consequences* are not to be regarded in the construction of Statutes, yet it is laid down by *Bacon*, itle, Stat. 9, that where the meaning is doubtful the *consequ-*

ences are to be considered in the construction. The reason for this rule is obvious. The Court are bound to follow the *intention* of the Legislature. Where the language of an Act is capable of but one meaning there is no difficulty in ascertaining it, but to do so where general words are used, it is necessary to consider whether a particular construction may lead to absurd, unjust, or inconvenient consequences, otherwise a mischievous operation might be given to an Act which the Legislature never intended it to have. To give the word "improvements" the comprehensive meaning contended for, would enable the purchaser to treat the land as if he had an indefeasible estate therein. He might cut timber to any amount, might clear land which the owner might not wish cleared, erect buildings, and claim payment for doing so. Indeed it is difficult to forsee the mischievous consequences which might flow from adopting the construction contended for. Under it, a person acquiring such temporary possession, might cut down ornamental groves or trees, and, thereby, cause great loss or injury to the owner, he might, in short, commit waste to almost any extent, or erect buildings, or make other alterations in the state of the property, and claim compensation for them. No Legislature could have intended the Act to have such an operation.

The form of the deed is given in the Schedule to the Act, and the proviso giving the "Equity of Redemption" must be considered as if inserted in every deed, and it, thereby, places the purchaser in the situation of a Mortgagee in possession. This construction, while it confines the purchaser's use of the property within those well defined rules, which prevent unnecessary injury to the owner, fully answers the *object* of the Legislature by enforcing payment of the small tax the owner omitted to pay.

We think a purchaser during the period allowed for redemption can neither commit waste nor claim remuneration for improvements which a Mortgagee in possession could not claim, and therefore, this claim of 40s for cutting trees must be disallowed.

In addition to this, the purchaser, *Ramsay*, attaches in his affidavit the following account:

Purchase money 41s., attending sale, 10s.	£2	11	0
Deed 10s., Registry certificate 2s 6d.	0	12	6
Registry deed 10s., tax for two years 13s 5d.	1	3	5

Travelling to pay tax twice 20s,	1	0	0
do to Town to register deed 40s,	2	0	0
Surveyor 1 day 12s 4d, 3 men with Surveyor 1 day each 15s,	1	7	4
Interest to date 12s,	0	12	0
	£9	6	3

The affidavit merely states that he furnished the owner's agent with this account. It contains no allegation that he did travel to *Charlottetown* for the particular purpose of registering the deed, or that when he did come here with it (if he did) he did not come on other business. Neither does it contain any allegation that he employed or paid a Surveyor. If positive and distinct allegations to this effect had been made, those charges might have been admissable, but from the extremely vague and uncertain manner in which the affidavit in this respect is framed, no regard can be paid by the Court to any items in that account, except those which we see must, necessarily, have been paid or incurred. These are as follows:

Purchase 41s, deed 10s,	£2	11	0
Registrar's certificate	0	2	6
Registering deed	0	10	0
Tax for 2 years	0	13	5
Interest	0	4	0
Tax sworn to be paid since service of the Rule	0	5	0
	4	15	7

The charges for attending the sale and to pay the land tax we think wholly inadmissable.

As the plaintiff in this case tendered to the defendant a larger amount than he was entitled to, which he refused to accept, he is entitled to the costs of this application.

The order will, therefore, be,

That the said *Lawrence Sullivan* do pay to the said *Arch'd Ramsay* the sum of £4 15s 7d, within six weeks from the date of this order, and that, thereupon, the said *Arch'd Ramsay* do recover and surrender the lands mentioned in the affidavits in this cause to have been conveyed to him by the Sheriff as therein stated, to the said *Lawrence Sullivan*, and that the said *Archibald Ramsay* do also pay to the said *Lawrence Sullivan* the costs of this Rule to be taxed—the said *Lawrence Sullivan* being at liberty to retain such costs out of the amount so ordered to be paid by him as aforesaid. But in default of the

said *Lawrence Sullivan* paying unto the said *Archibald Ramsay* what shall remain due to him as aforesaid after deducting such costs as aforesaid, within the time aforesaid, it is ordered that the Rule in this case be discharged, with costs to be taxed against the said *Lawrence Sullivan*, and that he be debarred from the benefit of redemption of and in the said lands.

SULLIVAN v. RAMSAY.

Easter Term, 1862.

Land Tax Act 11 *Vic.* c. 7, s. 12—If offer to redeem be made in two years from sale sufficient—Rule to redeem may be taken out after expiration of the two years—where there are no circumstances to excuse a tender, owner must make a legal tender in money—if dispute as to amount of redemption, either party may apply to Court.

This case involved the same points as the last to which it is not necessary to advert. But two other questions were raised.

The land was sold on the 30th September, 1859, consequently, the period for redemption expired on the 30th September 1861. The affidavit of *Cameron* states that on the 24th May 1861, he, on behalf of the plaintiff, tendered defendant £7 10s as redemption money. The Rule was taken out in *Michaelmas* Term 1861.

It is contended that as the plaintiff did not take out his rule until after the expiration of the two years allowed for redemption he is too late. It was urged that the two years allowed for redemption were analogous to a Statute of Limitations and therefore, not only must the owner tender repayment to the purchaser, but must also make his application to the Court within that time. But there is no analogy between this and the Statute of Limitations. The Statute of Limitations never begins to run until the *time* for payment has expired. Here the Statute allows two years from the day of sale to repay the purchase money. If the owner tenders a sufficient sum on the last day, or hour of that day, he has a right to have back his land. If the purchaser refuses to give it back, then, and not till then, does the right to Institute proceedings to compel him to do so, arise. If the application must be made to the Court before the expiration of the two years, the time allowed for redemption might often be materially abridged.

For instance, if payment were tendered the day after *Michaelmas* Term, where the two years would expire on the last day of December, he could not make the application until *Hilary* Term, and, therefore, according to this argument, he would lose his land, though he had really offered repayment two months before the two years had expired. Again, an owner might not know of the sale, or possess means to redeem until the last day of the two years. Is he therefore to be deprived of the privilege of redemption by the express words of the Act giving "*during the space of two years from the day of sale,*" because he could not repay the amount, or was ignorant of the claim to be redeemed until just before the expiration of the time allowed for doing it?

It was urged that if the application to the Court could be made after the expiration of the two years an owner who had made a tender might lay by for 10 years before making his application. It is unnecessary now to consider how soon after the expiration of the two years the application to the Court in such cases must be made, as we think in this case it was made within a reasonable time. Unreasonable delay might, perhaps, in this case, as in many other cases, be held a ground for refusing it. But no such inconvenience as urged really exists. The Act provides that an "Equity of Redemption" shall be open to the owner for two years to repay the purchase money and expenses &c, "the same in case of dispute to be settled by the Supreme Court." There is nothing in the Act which restricts the jurisdiction of the Court to an application at the instance of the owner only. When a dispute has arisen the owner may obtain a Rule calling on the purchaser to recover on payment of the amount to be fixed. Or the purchaser may obtain a Rule calling on the owner to pay the amount or be debarred from redeeming. The Act never could have intended to create a jurisdiction for determining disputes between two parties to which both should not have an equal right to resort for settling a controversy which both were equally interested in determining.

It is next objected that no *legal* tender was made.

The affidavit of *Cameron* states that he tendered the defendant, *Ramsay*, £7 10 in gold as repayment for the purchase money. Though this, if uncontradicted, might have been a sufficient allegation, it would have been more correct had the affidavit stated in what manner he offered the money, leaving

the Court to judge of the validity of the tender. But the affidavit of the defendant, and also of *Campbell*, who was present at the time of the alleged tender, clearly shew that whatever *Cameron's* intention might have been he never produced any money or made any offer which could amount to a legal tender of *any amount*. We do not mean to hold that an actual tender is in all cases necessary. If a purchaser (for instance) refused to furnish an account of his demand the owner would not know what was due. In such case an offer and readiness to pay what the purchaser might be legally entitled to, would be sufficient. Nor do we wish to be understood as holding that the *right of redemption* would, in all cases, be barred in consequence of a tender being something less than the amount afterwards allowed by the Court, if satisfied that the tender had been made with the *bona fide* intention of paying the amount really believed to be due, though on the question of costs it would, as in other actions, be decisive.

But we think that where no refusal of an account, or other circumstances which might excuse a tender, appear, the owner is bound to make a legal tender of the amount which he must, or might know could legally be claimed. A purchaser might reasonably decline agreeing to an amount which the owner might exercise the option of paying or not which if offered in money he would have accepted. And we are, therefore, of opinion that the Rule in this case must be discharged.

The order, therefore, is that the Rule in this case be discharged with costs, and that the plaintiff, *Lawrence Sullivan*, be debarred from any Equity of Redemption in the lands in the affidavit in this cause, mentioned to have been conveyed by the Sheriff of Prince County to the defendant, *Arthur Ramsay*, as therein stated.

HEARD v. PHILLIPS.

SUMMONED AS GARNISHEE OF BRADLY, AN ABSENT DEBTOR

Easter Term, 1862.

Absent Debtor Act—a person in possession of choses in action of absent debtor, not chargeable as garnishee.

In this case it is unnecessary to consider many points raised on the argument, as from the defendant's examination it

appears that the assets assigned to him consisted of Goods and Chattels to the value of £914, and debts due from third persons amounting to £607 (a very small part of which has been collected.) The amount due for the payment of which the assignment was made, (not including £497 which the garnishee states he has had to pay to previous incumbrances to preserve his Bill of Sale) is about £1300. It is clearly laid down by both *Cushing* and *Drake* that a person having in his possession choses in action cannot, in respect thereof, be charged as garnishee, *Drake* 425. In this case, therefore, the defendant was not liable to be proceeded against in respect of the £607 of debts, and deducting that amount there would clearly be no balance left to which the absent debtor, *Bradly*, could have a claim, and for which his creditors could garnish the defendant.

The Rule for a non-suit must, therefore, be made absolute.

THE QUEEN *v.* WHELAN.

Trinity Term, 1862.

Libel—criminal information—where libel charges applicant for Rule with having by previous article provoked it—the charge must be answered by affidavit on which Rule moved.

This was a Rule calling on the defendant to shew cause why a criminal information should not issue against him for a libel on *Wm. Pope*, published in the "*Examiner*" Newspaper, of which the defendant is proprietor.

The explanation given by the defendant of his meaning of the word "arraigned," on which the criminal character of the charge made against Mr. *Pope*, in the article complained of chiefly depends, raised some doubt in our minds on the argument, but we are satisfied that that explanation would not be a sufficient answer to the application.

The libellous article, however, clearly charges Mr. *Pope* with being the author of a previous article in the *Islander* to which the article complained of is evidently a reply. The defendant also swears that it was published in reply to that article which he then, and yet, believes to have been written by Mr. *Pope*.

The principle which governs the Court in applications of this nature appears to be that the party applying for a

criminal information must come into Court with clean hands. He must not only shew himself innocent of the charge made against him, (that is most fully and satisfactorily done here) but he must not appear to have done anything to provoke the attack of which he complains,

In the case of *Rex v. Taylor* 1 Jur. 53, where a Rule was obtained against the defendant who was Proprietor of the "*Manchester Guardian*," for a libel on Mr. *Royas*. The alleged libel *insinuated* that certain articles in the "*Manchester Chronicle*" emanated from Mr. *Royas*. The defendant does not appear to have used any affidavit in reply.

Tollet, in shewing cause, submitted that as there appeared to be a controversy between the two Newspapers, there should have been a more explicit denial by Mr. *Royas* that he had any knowledge of the articles in the "*Manchester Chronicle*" before they appeared. And on that ground, viz., that the applicant's affidavit did not deny knowledge of those articles, the Court discharged the Rule.

Mr. *Pope* in his affidavit makes no denial of his authorship of the article in the "*Islander*" attributed to him in the libel. And we think this case of *Rex v. Taylor* is, therefore, conclusive against the Rule.

One difficulty suggested itself to our minds in applying the principle broadly laid down in this case to all cases. And it was this, viz., that the article alluded to in the libel, as provoking it, might really be a severe, but merited and justifiable criticism on an improper publication. And although the doctrine of *Rex v. Taylor* appeared to us conclusive against the application, we delayed giving a decision at the last term that we might have an opportunity of looking further into the authorities than the short period between the argument and the rising of the Court permitted. But further investigation has only confirmed the opinion we then formed.

The doctrine appears to be that where the libel, either directly or by insinuation, charges the applicant for the Rule with having, by a previous writing, provoked it, he is bound in his affidavit, on which the Rule is moved, to answer it. This he may do by denying that he is the author, or by admitting it, and then setting out the article in his affidavit, or in some other way shewing the Court that it was a proper and justifiable criticism or communication, and not of a nature that could reasonably provoke such a severe retort.

Neither of these courses has been adopted here, and we, therefore, think the affidavits are insufficient, and that this Rule must be discharged, but under the circumstances, without costs, and that Mr. *Pope* shall be at liberty to proceed either by Indictment or action if he shall see fit.

THE QUEEN v. WHELAN.

Hilary Term, 1863.

Libel—criminal information—a party seeking a criminal information against another must himself be free from blame.

This was a Rule to shew cause why a criminal information should not be granted against the defendant, the Proprietor and Editor of the "*Examiner*" for a libel on *Wm. Pope*.

The defendant, in his affidavit, in answer states that the plaintiff is well known to be the Editor of the "*Islander*" Newspaper, wherein attacks of a very gross, malicious and libellous nature are, from time to time, made on the character of the defendant in his private as well as public capacity, one of which, was published in the "*Islander*" of the 30th, signed "*Responsis*". He sets out in his affidavit and alleges that he believes that it was published with the knowledge and concurrence of the prosecutor. The defendant in the close of his affidavit also alleges that the prosecutor is in the frequent habit of libelling him. From the affidavits it appears that the prosecutor and defendant are the editors of two rival Newspapers, and are in the habit of writing with much acrimony against each other. The article signed "*Responsis*" set out as in the "*Islander*" of the 3rd October, contains a charge against the defendant of a nature similar to that with which the prosecutor complains the defendant has charged him.

It was urged that there was no proof that *Pope* was the author of the article signed "*Responsis*," or concurred in it, and that as it appeared as an anonymous communication and not as an editorial, it should not be presumed that he wrote or concurred in it. In the nature of the thing such proof by the defendant was next to impossible; but the defendant swears he believes it was published with his concurrence and knowledge. On an application of this kind the Court is bound to weigh the probabilities, and looking at the circumstances that

it is evidently a reply to the libel now complained of, and published in the paper of which the prosecutor is editor, we think we may reasonably presume that he was at least, not ignorant of it.

In *the Queen v. Lawson*, 1 A. & Ell., N. S., 486, where on an application for a criminal information for a libel by the foreman and several of his fellow jurors, it appeared that the foreman had published a letter commenting in strong terms on the publishers of the libel, though, as it appeared, *without the request, knowledge, or concurrence of the other jurors* who did not see the letter, and were not aware that any such letter had been sent till after he had sent it. The Court believing from the circumstances that the other jurors knew (*in sufficient time* to have *interfered*) of the foreman's intention to publish the letter on behalf of himself and fellows, discharged the Rule.

In the present case (even if the article signed "*Responsis*" was not written by or with the concurrence of Mr. *Pope*) we cannot doubt that being an answer to an attack upon himself he must, as editor of the paper, have been informed of it in time to have prevented its publication, and he, therefore, must be affected by it in the same manner as the jurors were affected by the unauthorized publication of their foreman.

The defendant's affidavit also contains another distinct allegation that the prosecutor is in the frequent habit of libelling him.

Under these circumstances the prosecutor, in our opinion, comes clearly within the Rule adverted to by the Court on a similar application recently determined between the same parties, viz., that the party seeking a criminal information against another must himself be free from blame. We think he is not so here, and, therefore, the Rule must be discharged.

It was urged that the prosecutor had no opportunity of answering the defendant's affidavit, but this is always the case with respect to affidavits used in shewing cause against Rules *Nisi*. And in the *Queen v. Grigor* 8 A. & Ell., 909, on application for a criminal information we find Lord *Denam* giving credence to affidavits to which a similar objection was urged.

The Rule must, therefore, be discharged, but without costs, and that the prosecutor be at liberty to proceed either by Indictment or action, as he shall see fit.

SULLIVAN *v.* CARR AND H. & J. RAMSAY.

Hilary Term, 1863.

Land Tax Act—Redemption—where purchaser of land under Act transfers his right to another before time for redemption expired, tender to purchaser is sufficient—where purchaser must be aware that person tendering does so as agent of owner, sufficient though owner not expressly named by agent.

This was an application to redeem land sold for non-payment of tax under 11 *Vic.* cap. 7. From the affidavits it appeared that *Hugh Carr* became the purchaser at the sale of 236 acres of land (which is now sought to be redeemed) for the sum of £2 10s. The plaintiff's agent, in his affidavit, swears that on the 21st day of May, 1861 he, in the name and on the behalf of the plaintiff tendered £9 to defendant, *Hugh Carr*, as the redemption money which he refused to accept. On this affidavit a Rule *Nisi* was granted against *Hugh Carr*, but on shewing cause he deposed that before the tender he had sold and conveyed the land to *Hugh and John Ramsay*, whereupon the Rule was enlarged and amended by making them parties. And cause was shewn at the last term on behalf of all the defendants.

The 8th sec. of the Act provides that no conveyance made under the Act shall be valid unless registered within 12 months of the day of sale, a provision absolutely necessary to enable the owner to find out to whom he is to tender repayment of the purchase money. If the purchaser were allowed after registering his deed, by *thereby* conveying the land to another to divest himself of that character and thereby prevent the tender of repayment being made to himself, the intention of the Act evidently might be defeated. Because if the purchaser's assignee did not record his deed and gave no notice of it to the former owner, as appears to have been the case here, the former owner might not, until after the period for redemption had expired, be enabled to ascertain to whom he should tender repayment. It is clear, therefore, that in this case the tender of repayment to *Carr* was sufficient to prevent the title of either himself or *Ramsay* becoming absolute. Indeed this point was scarcely insisted on at the bar.

The point chiefly insisted on was this. *Hugh Carr* and his brother, *Donald Carr*, in his affidavit, states that when *DeBlois*, the plaintiff's agent, made his tender he did not

express that he made it in the name and on the behalf, or as the agent of the plaintiff, and that when he exhibited the money to the defendant he did so without naming or referring to any person as owner or proprietor of the land. And for this reason it was insisted that the tender was bad. But the affidavit of *DeBlois* and also of *Cameron*, who was present, state that it was made in the name and on the behalf of the plaintiff. No particular form of words is necessary in making a tender. It is enough if the party understand on whose behalf it is made. And if he had intended to rely on that as a defence he should have distinctly sworn that he was ignorant and really did not understand on whose behalf *DeBlois* acted in making the tender. If evidence on this point was necessary the affidavit of *Cameron* would be conclusive. From it, it appears that the principal part of the land in question is a farm called *Rose Hill.* That one *John Ramsay* the father of the defendants, *Hugh* and *John Ramsay*, (who has been long since dead) was, in his lifetime, tenant thereof to the plaintiff. That ever since his death they have continued to reside with their mother, *Martha Ramsay*, and that defendant, *Hugh Carr*, is married to their sister, and that *Martha Ramsay*, since her husband's death, hath been and still is tenant to the plaintiff.

Here then we have the son-in-law buying in his mother-in-law's farm for 50s, for the non-payment of a tax which she, as the tenant and occupier should have paid, and then conveying it to her sons who have always resided with her on the farm. Under these circumstances it is absurd to suppose *Hugh Carr* could have been ignorant of the plaintiff's claim to the land.

The plaintiff is, therefore entitled to redeem, and as the defendants have furnished no account of their claim, but have resisted the application on general grounds, the amount tendered must be deemed sufficient, and the Rule must be absolute with costs.

The order will, therefore, be that the said *Lawrence Sullivan* do, within 2 calendar months after the date of this order, pay to the said *Hugh Ramsay* and *John Ramsay* the sum of nine pounds, or as much thereof (if any) as shall remain due after deducting costs hereinafter mentioned; and that thereupon the said *Hugh Carr*, *Hugh Ramsay* and *John Ramsay* do recover the lands mentioned in this cause to have been conveyed to the defendant, *Hugh Carr*, by Sheriff's deed, and by him the said *Hugh Carr*, sold and conveyed to the said *John*

and *Hugh Ramsay*, as therein stated to the said *Lawrence Sullivan*. And it is further ordered that in such conveyance a proviso be introduced that such conveyance shall not prejudice, affect, or make void any right or claim which the said *John* and *Hugh Ramsay*, or either of them, now or hereafter may have to the said premises, or any part thereof, under or by virtue of any lease thereof granted by the said *Lawrence Sullivan*, or any person or persons through whom he claims. And that the said *Hugh Carr*, *John Ramsay* and *Hugh Ramsay* do also pay to the said *Lawrence Sullivan* the costs of this Rule to be taxed. The said *Lawrence Sullivan* being at liberty to retain such costs out of the amount so ordered to be paid by him as aforesaid. But in default of the said *Lawrence Sullivan* paying unto the said *Hugh Ramsay* and *John Ramsay* what (if anything) shall remain due to them as aforesaid after deducting such costs as aforesaid within the time aforesaid, it is ordered that the Rule in this case be discharged with costs to be taxed against the said *Lawrence Sullivan*, and that he be from thenceforth debarred from the benefit of Redemption in the said lands. Dated this 26th day of January, 1863.

THE QUEEN *v.* THOMPSON & WALSH.

Hilary Term 1863.

Jury *de mediatate linguae*—If right to ever existed in Prince Edward Island is abolished by Island Jury Act.

In the case of the *Queen v. Williams* we held that an alien was not entitled to a Jury *de mediatate linguæ* because our Jury Act expressly provides that the Jury for the trial of all civil and criminal cases shall be liege subjects, and also adopts an entirely new system of choosing jurors, and having made no exception in favor of an alien's right to a jury *de mediatate linguæ*, that right (if it ever existed in this Colony) is abolished.

The same effect appears as (Bl. Com. thinks unadvisedly) to have been produced by 25 *Geo.* 3, c. 25, on the aliens right to such a jury *in civil suits*. By the 28 *Edw.* 3, c. 13, aliens in civil as well as criminal trials were entitled to a jury *de*

mediatate linguæ. But the 25 *Geo.* 2, c. 25, having made new provisions for the empanelling of jurors in civil cases without any saving clause respecting an alien's right, was held to repeal that part of the 28 *Edw.* 3, relating to civil suits.

And in the *English* Statute 6 *Geo.* 4, c. 50 which makes new provisions for empanelling jurors in both civil and criminal cases is preserved by express provision.

It is also observable that the 1st *Ph.* & *M.* c. 10 which was held to deprive aliens of the right in cases of Treason, only contains general words, that persons accused of Treason shall be tried according to the course of the Common Law.

The *Attorney General* in this case offered to waive any objection to the motion and to allow the defendant to have a jury *de mediatate linguæ.*

But it is laid down 2 Com. Dig. 183, "and a trial *per mediatatem linguæ* where it ought not to be is not good *though by consent* for that shall not alter the Law."

Sherley's case 2 Dyer 144, 2 Hawks 590.

REDDIN *v.* JENKINS.

Hilary Term, 1863.

Registry Act—Judgments binding land—where L conveyed to I, and subsequently to the conveyance, but before its registry judgments were entered up against L—held such judgments did not bind the land conveyed.

From the facts stated in the special case, submitted in this cause, it appears that one *Wm. Lobban,* by deed executed on the 3rd of May, 1854. but not registered until April 1860 conveyed certain lands therein described to *Jenkins.* That in 1859 the defendant exchanged these lands with the plaintiff for certain other lands owned by him. That by the agreement the title to the defendant's lands was to be clear and marketable. That the plaintiff has conveyed his land to the defendant, and that the defendant has tendered a conveyance of the land mentioned in the deed of May 1856 to the plaintiff, which he refuses to accept in consequence of their being certain judgments entered up in the Supreme Court against *Lobban subsequently* to the execution of the deed of the 3rd of May 1859, but

previous to its registry. That no memorial of these judgments is registered in the Registry Office.

The question raised, therefore, is, whether a judgment (no memorial of which has been recorded in the Registry Office) binds lands *previously* conveyed to a *bona fide* purchaser who has neglected to register his conveyance until after the judgment has been entered up. The question, as affecting real estate, is an important one.

The 10 sec. of 3 *Wm.* 4, cap. 10, which provides that no unregistered deed shall defeat any deed of the same lands duly registered, contains a proviso that the Act shall not affect judgments, although no Memorial thereof be recorded in the Registry, "but such judgments shall have the same effect as if this Act had not been made." On the execution of a deed (and without Registry) the estate in the land passes to the grantee. As the Act leaves judgments in the same plight as if the Act had not been made, and as at Common Law the judgment only binds lands to which the defendant, at the time of its entry, was entitled, it is clear that a judgment against the grantor cannot bind lands which he has previously conveyed, because at the time of this judgment being entered up the estate in the land so conveyed was vested in another.

The effect of the proviso is merely to protect judgments entered previous to the execution of the conveyance, and which, therefore, bound the defendant's land from being subsequently defeated on its registration by the operation of the Statute.

But the 23 *Vic.* cap. 27, enacts "that judgments already entered up, or hereafter to be entered up against any person in the Supreme Court, shall operate as a charge upon all lands, and of, or to which such person was, or shall be at *the time* of entering up such judgment, or was, or shall be at any time afterwards seized or entitled for any estate whether in reversion, remainder, or expectancy, or over, which such person at the time of entering up such judgment, or at any time afterwards had, or shall have *any disposing power which he might*, without the assent of any other person, exercise for his own benefit."

It was urged that if *Lobban*, at the time the judgment was entered, had executed a deed to another who had registered it, it would convey the estate, notwithstanding the previous

conveyance to *Jenkins*, and that, therefore, *Lobban* must be considered at that time to have had a disposing power.

But the deed would, in that case, have operated, not by virtue of any seizure passing from *Lobban*,(for that had already passed from him to *Jenkins* by the deed of May 1856) but by virtue of the Act of 3 *Wm.* 4 cap. 10.

The disposing power mentioned in the Act must mean a disposing power which may be exercised lawfully and without fraud which the Act could never have intended to render it legal to commit, though from policy it protects the innocent vendee whose deed is registered from being affected by it. The finder of a bag of money with the owner's address on it, acquires, by such accidental possession, power to pass it away, and so may be said to have a disposing power over it. Yet in doing so he would be guilty of Larceny.

Besides the disposing power mentioned in the Act must be one which a person may exercise in any manner he pleases for his own benefit. Suppose *Lobban* after the conveyance to *Jenkins* had executed a deed of the land to trustees for his own benefit which they record, could it be argued that it would defeat the previous unregistered deed?

We think the judgments mentioned in the case do not bind the lands conveyed by the deed of May 1856 to the defendant and, therefore, judgment must be for the defendant.

(NOTE).—*Vide Wickam v. the New Brunswick and Canada Railway Company* 1 P. C. L. Rep. 65.

DOE DEM STEWART *v.* M'PHEE.

Easter Term, 1863.

Ejectment for want of property to distrain—where bailiff in searching for property to distrain on—in passing hovel asked tenant if it contained property and he answered, no—held tenant was not estopped on trial from shewing that it contained property.

This was an action of Ejectment on a condition of re-entry under the Statute for want of property whereon to distrain.

From the evidence of the Bailiff it appeared that he was sent to search the premises, and also with a declaration in Ejectment to serve in case no property was found. That in

going to the premises he met the defendant and informed him of his intention. He proceeded to search the premises and found nothing. That while engaged in the search on passing a hovel he asked the defendant if there was any property in it, to which he replied that there was not, and the Bailiff passed on without searching it, and then served the Ejectment. The defendant did not dispute his having given the answer, but proved that there was, at the time, on the land, property sufficient to satisfy half a year's rent. The plaintiff was not prepared to contradict this statement, but contended the defendant was estopped from controverting the truth of his statement to the Bailiff. The Judge was of opinion that he was not estopped and expressed a strong opinion on the case against the plaintiff. He submitted to a nonsuit.

A Rule was granted to shew cause why the nonsuit should not be set aside and a new trial granted, and we are indebted to the Counsel on both sides for a careful and elaborate research into the authorities, as well as for the acute and lucid manner in which they have been commented on, and by which we have found ourselves materially assisted in considering the question.

The conclusion we have arrived at is, that under the circumstances of this case, the defendant was not estopped from shewing that there was property in the hovel which might have been distrained.

It is a maxim of law that no man shall take advantage of his own wrong. And there can be no doubt of the soundness of the principle founded on that maxim, that he who wilfully by his words or conduct prevents a thing being done, shall not either as plaintiff or defendant avail himself of the non-performance he has occasioned.

But the question here is, whether the representation was such as under the circumstances a Bailiff would naturally rely upon, if it was not, the defendant can scarcely be said to have occasioned the non-performance of the act.

Now what are the facts? In searching for property to distrain the Bailiff passes a hovel (not appearing to be a place where anything could be found.) He asks the defendant if there is anything in it, and the defendant replies there is not. The defendant does not appear to have used any artifice or other means to induce him to abstain from searching the hovel.

No authorities with which we are acquainted go the length

of holding that a mere untrue answer to a question which a party has no right to put, shall prevent the party answering from afterwards shewing the truth in his defence.

Here the defendant was under no legal obligation to assist the Bailiff, and he was under a pressure when men are naturally disposed to shield their property if they can. From the question asked he might naturally infer that the Bailiff did not think the hovel worth searching, and would likely pass it by. He was not bound to answer. But it is argued that if he did, he must answer truly. In some cases such an obligation may indeed exist, but in many cases so strict an adherence to sound morals is not required. Thus in *Vernon v. Keys* 12 East 637, Lord *Ellenborough* says "this appears to be a false representation in a matter *gratis dictum* by the bidder in respect to which the bidder was under no legal pledge or obligation to the seller for the precise accuracy and correctness of his statements, and upon which, therefore, it was the sellers own indiscretion to rely." Besides, here the question placed the defendant in this dilemma. If he answered in the affirmative, he, in reality, assisted the Bailiff by leading him to the property. If he was silent, his reluctance to answer might raise a suspicion in the Bailiff that would lead to a similar result, and, therefore, to prevent himself from being, by his words or conduct, made instrumental in altering the Bailiff's intention of passing the hovel without search, he might feel it necessary to answer as he did.

The soundness of C. B. *Pollock's dictum* in *Bowes v. Foster* Hurlstone & Norman's Rep. "that a man who under the pressure of distress and misfortune, makes a misrepresentation is not in the same *delictum* as the man who does so without such motive," may, as a rule for general application, be open to question; but there can be no doubt of its appositeness to a a case where, by the words or conduct of one party, another, to avoid compromising himself, is reduced to the necessity of making a false statement which it is attempted sought to estop him from contradicting.

The Rule as laid down by Lord *Denman* in *Pickard v. Sears* 6 A. & Ell. 474, requires that the statement must be made under such circumstances as would naturally induce the party acting on it to believe its truth. Now, no reasonable man really anxious to find property to distrain would give much credence to a tenant's statements made under the circumstances

in which the defendant was placed. Although if his real object were to lay the foundation for an Ejectment it would further his purpose to act on the assumption of its truth, to avoid the discovery of property small, compared to the rent due, yet sufficient to destroy the foundation of the contemplated action.

The *American* case *Presbyterian congregation v. William G. Wendell* was much relied on for the plaintiff. There the defendant in an action of Ejectment brought in a condition of re-entry for nonpayment of rent without sufficient distress on the premises, had declared at the time of the distress made that the property on the premises did not belong to him, and it was held that he was estopped from shewing at the trial that it did. But in that case the false statement arose in the wilful and voluntary conception of the defendant, made for the fraudulent purpose of inducing the plaintiff to give up goods then in his possession, which he had a legal right to retain, and was not elicited by a previous question. The plaintiff, under the circumstances would, naturally, believe the statement to be true, and could have no present means of ascertaining it to be false. Here the statement is elicited by an unauthorized question put to one in whom the questioner had no right to repose confidence, and whose position must tempt him to answer untruly, and respecting a subject matter then present, the examination of which would have tested its correctness. If in such a case a party neglects the higher evidence of ocular demonstration and trusting to the answer, omits the performance of a necessary act, he seems prevented from performing it rather through his own indiscretion than by any wilful misrepresentation of the defendant. Such a case comes clearly within the rule laid down by *Story* (1 Equity 208) "that it is not every wilful misrepresentation even of a fact which will avoid a contract upon the ground of fraud if it be of such a nature that the other party had no right to place reliance on it. And it was his own folly to give credence to it, for Courts of Equity, like Court of Law, do not aid parties who will not use their own sense and discretion upon matters of this sort."

A case was put by Mr. *C. Palmer* of a tenant telling a Bailiff that he did not wish him to enter a private room, and that there was nothing in it. It was asked, might he not in such case rely on the statement and omit the search? Unquestionably he might. That would be like the case of the

drawer of a foreign Bill (to save expenses) requesting the holder not to present it, who is afterwards prevented from objecting to the want of protest in an action on the Bill. So in the case put, the tenant would not be allowed to insist on the nonperformance of an act omitted to be done for his benefit and at his request, nor to contradict the truth of the statement by which he induced the nonperformance.

In such cases there is an implied agreement that if the one party will omit to do the act the other will not object to its omission.

It is unnecessary to refer particularly to all the cases cited at the bar where admissions or representations have been held binding on the parties making them. In all the relative position of the parties, with respect to the transaction or subject matter, was such as entitled the party deceived to expect correct information from the party making the misrepresentation, or there was a suppression of facts which, under the circumstances, the party was bound in conscience and duty, to disclose, or he was silent when he was bound to speak and give notice of his claim.

We think, however, that the nonsuit was incorrect, the defendant having given evidence to contradict his former statement, the plaintiff had a right to have the credibility of his testimony submitted to the Jury. The Rule must, therefore, be absolute for a new trial, but the costs to abide the event This course cannot prejudice the defendant, for, if on the second trial the Jury believe him, he will have a verdict and the costs of this Rule will be taxed to him, and if they disbelieve him he cannot complain that he has been prevented from profiting by his own falsehood.

Rule absolute—costs to abide event.

SULLIVAN v. CARR and H. & J. RAMSAY.

Hilary Term, 1864.

Land tax deed— demption—Attachment granted against defendants, purchasers, for not executing deed of reconveyance according to order of Court.

The order to execute the reconveyance was made in *Hilary Term*, 1863, but the plaintiff's Attorney, in consequence of

obstacles thrown in his way by defendants, could not succeed in serving the order and tendering the deed for execution. In *Easter* Term on affidavit of facts shewing attempts to serve the Court ordered that the deed ordered by the Rule of *Hilary* Term should be deposited with defendants' Attorney, and should be executed by them within a certain time. This Rule was duly served on all the defendants and their Attorney, and the deed deposited with him. The defendants did not execute it, and a Rule *Nisi*, for an attachment, was granted. In shewing cause, the defendants' Counsel produced affidavits to shew that they did not oppose obstacles to prevent plaintiff serving the rule and tendering the deed for execution by them. On hearing all the affidavits, we are satisfied that there was ample ground for inducing the Court to fix the office of the defendants Attorney as the place where the deed should be deposited for their execution.

But the defendants' Counsel object that the Rule *Nisi*, by its wording, only calls on them to shew cause against the Rule of *Hilary Term*, and there being no previous service of that Rule, defendants cannot be put in contempt, and that they are not bound on this Rule to answer for not obeying the Rule of *Easter* Term, and that to compel them to do so would be to take them by surprise. But we think the order of *Hilary* Term is the foundation of the whole proceeding It was that order which directed the defendants to convey, but no *place* for execution of the deed being named in it, it became necessary for the plaintiff's Attorney to seek out the defendants and tender it to them for execution. The order of *Easter* Term is merely supplementary, for in fixing a particular place where the deed should be left for execution by the defendants, leaves the original order still in force which bound them to reconvey.

But it is further urged that the Rule *Nisi* is drawn up in reading "*Rule and affidavit*," and that this must be held to refer to the Rule mentioned in the body of the order, viz., the Rule of *Hilary*. But on looking at the papers it appears clear that such could not have been the case as there never was any Rule served but that of *Easter*, with which the defendants and their Attorney were served, and on the reading of which Rule and affidavit this Rule *Nisi* was granted. Under these circumstances it is absurd to suppose that the defendants and their Attorney could be taken by surprise, or could suppose that they were not called on to excuse them-

selves for not executing the deed deposited with their Attorney.

The Rule must, therefore, be made absolute. But as the wording of the Rule *Nisi* afforded some ground for doubt on which the defendants' Counsel seem to have resisted the Rule, the order will be that no attachment do issue thereon until after the first day of March next, and then that such attachment do issue only against such of the defendants as shall not, on or before that time, have executed the deed of reconveyance now deposited with Mr. E. Palmer, their Attorney.

THE QUEEN v. CHAS., WM. & ARTEMAS LORD.

Easter Term, 1864.

Sea Shore—right of Public to have way over shore when tide out—right of riparian owner to make erections on shore—riparian owner has the right to sea-weed deposited between high and low water mark.

This was an Indictment for a nuisance. The defendants had erected a wier on the sea shore in front of their farm for the purpose of collecting seaweed. At the trial certain questions were by consent left to the Jury, and answered as follows:

1. Whether the site of the wier, erected by the Traversers, on the shore of *Cumberland Cove*, is between ordinary high and low water mark? Ans. The greater part of it is.

2. How long, and for what period, and for what purposes, and by whom the said space between ordinary high and low water mark has been used? Ans. Fifteen years, for hauling seaweed, stone and shell-fish by the neighbors.

3. Whether the site on which the wier is erected from end to end in every part of it was, at any former period, sand hill land, or marsh land, and belonged to the farm occupied by *Charles Lord*, one of the Traversers, although now washed away and covered by water at ordinary high tides? Ans. It was sand hill, and belonged to the farm occupied by Charles Lord one of the Traversers.

4. Whether a sufficient Highway for horses, carts and carriages does, or does not exist between the head or commencement of the wier erected by the Traversers, and the front or

marsh of *Charles Lord's* farm on *Cumberland River*? Ans. There does exist a sufficient Highway.

5. Whether a Highway sufficient for horses, carts and carriages does or does not exist at the outer end of the wier erected by the Traversers on *Cumberland Cove*? Ans. There does not exist a sufficient Highway.

6. Whether by the erection of the wier by the Traversers in *Cumberland Cove*, the Public, generally, are impeded in travelling, hauling, or in any way however, in getting sea weed, stone, shell-fish, or any other thing to which the Public at large have a right on the shore at *Cumberland Cove*? Ans. They are not impeded

The question now is, whether the facts so found amount to a verdict of guilty. It was contended by the defendant's Counsel that the shore on which the wier was erected having been once comprised in the defendant's farm there was nothing in the finding to shew that the encroachment of the sea had been of that gradual kind which would deprive the owner of his right to the soil now overflowed. But without deciding this point we think it more advisable that our decision should be given on the general and more important question raised by the *Attorney General, viz.*, whether the owner of land can place such an erection on the shore in front of his land, below ordinary high water mark, for the purpose of collecting sea-weed floating on the water, or securing it when relicted, without being guilty of a nuisance for obstructing a highway?

The *Attorney General* contends that the sea shore between high and low water mark during the reflux of the tide, is a common Public Highway and that the Public have a right to travel over *every part* of it, and therefore an erection which obstructs the way, or any part of it, is a nuisance in the same way as if it was a highway on land.

For the defendant, it is contended that he has the right to collect sea-weed floating on the sea, or lying on the shore between high and low water mark, and, therefore, he has the right of using such means as he thinks fit for collecting or securing it, provided a sufficient way is left so that the Public are not, really injured.

Assuming the Public to have a right of way on the shore between high and low water mark when the tide is out, it will be convenient, in the first place, to examine whether there is a complete analogy between it and a highway by land. In the

case of a highway by land, whether created by dedication or user, it is, in its nature, applicable, and must be presumed to have been intended to be used only for one specific purpose, viz., to allow the Public to pass along it, and as it cannot be presumed that more than was necessary for that purpose was either given or taken, the right of passing extends over every part of it without being liable to abridgment or interference from the exercise of other lawful but subservient rights. *William v. Wilcox* 8 Ad. & Ell. 329, and every obstruction placed on it is a nuisance, and, as laid by *Roscoe*, (564) "it is no excuse that logs are laid so that a passage is left." And in *the King v. Russel* 6 East 427, the defendant was convicted of a nuisance in obstructing a street by keeping a wagon standing constantly before his door (though his trade, as a carrier, rendered it necessary) and although there was a sufficient passage for carriages left open, the Court say "that the defendant could not lawfully carry on any part of his business in the public street to the annoyance of the public. That the primary object of the street was for the passage of the public and that anything which impeded that free passage was a nuisance." A verdict in such case finding the obstruction, but that it was no nuisance, would amount to a conviction. See *Regina v. Charlston* 22 L. & E., Rep. 240. But the public right in the use of navigable waters is not *confined* to the right of navigating or passing along them. That is indeed the primary right, but there are other rights, such as the right of Fishery, which, though subservient, is equally well recognized in law. Now admitting the existence of a right of way on the shore when the tide is out, it must certainly be subject to the same kind of interference from other conflicting rights, as it was when covered with water. Does it follow then that every erection on any part of the shore, when left dry, is a nuisance as obstructing the right of way? The right of navigation is the paramount right, and "*per se*" gives every one a right to sail his craft in any direction he pleases, but in as much as in the exercise of the opposing right of fishery, various contrivances all for a time requiring possession of parts of the water are necessary, that to a certain extent, limits or interferes with the exercise of the paramount right. Thus, suppose the fisherman's net is spread, can a person, voluntarily, run his craft through it when there is a sufficient passage left, and when neither danger from shoals nor press of wind renders it necessary to

do so? *Angell*, 81, treating of this subject, says "that where a net was run through in the Passaic river, the decision was that the right of fishing must yield to the right of navigation where the two rights come in conflict *and that* where *one right only can be enjoyed* that of navigation must be the one. *At the same time it does not swallow up and obliterate the right of fishing*, and where *both rights can at the same time be enjoyed freely and fairly, that of navigation has no authority to* trespass upon *and incommode* the other. The right of navigation, though superior, does not take away the right of fishery, but only limits it and limits it only so far as it interferes with *its own fair, useful and legitimate exercise*. If the master of a vessel, under the pretence of exercising his right, should *wantonly turn out of his regular course* to run upon a net, or lie in wait till the net be spread, and then crowd sail to reach it, or if he should *unnecessarily* and *wantonly* anchor on fishing ground in those and in like cases, he is answerable in damages."

Now, what are the rights of riparian owners, with respect to seaweed. In an *Irish* case, *Howe v. Stawell*, Alcock & Nap. Rep. 351, where it was held that the public had no *common law right* to enter and take seaweed from the shore between high and low water mark. It was asserted by Counsel and not denied that the public had a right to take it in boats while floating in the sea. And it is expressly laid down by *Angell*, 261, "that the right to take sea weed *below low* water mark is in the public and not *exclusively* in the riparian owner." But it is an ancient and well established rule of law, that alluvion, or whatever may aid in the formation of land deposited gradually, or by little and little, belongs to the owner of the adjoining land, and, therefore, a stranger has no right to remove sand or other marine substances as they are from time to time washed up and deposited on the shore, or else their accumulation, which might in time form land, or raise the beach which protects it, might be prevented. And it has also been decided that artificial means may be brought to aid natural causes in producing it. See *Adams v. Forthingham* cited *Angell* 251. *Angell*, after treating of the nature of alluvion, p. 259, says "it is consistent with the explanation which has been given of the legal meaning of imperceptible increase that seaweed deposited upon the shore by natural means *below the ordinary high water mark* should belong to the riparian proprietor bounding opposite. And it has so been held. In *Emans v. Turnbull* in

New York, the question, who had the right to seaweed, came directly before the Court, when the opinion of the Court was given by *Kent*, C. J., as follows:—Seaweed thrown up by the sea may be considered as one of those marine increases arising by slow degrees, and according to the rule of the Common Law, belongs to the owner of the soil. The rule is, if the increase be by small and almost imperceptible degrees it goes to the owner of the land, but if it be sudden and considerable, it belongs to the Sovereign. Seaweed is supposed to have accumulated gradually. The slow increase, and its usefulness as a manure and as a protection to the bank will, upon every just and equitable principle, vest the property of the weed in the owner of the land. It forms a reasonable compensation to him for the gradual encroachments of the sea to which other parts of his estate may be exposed. This is the sound reason for vesting the marine increments in the proprietor of the adjoining land. The *jus alluvionis* in this respect ought to receive a liberal encouragement in favor of private right. As the principles on which the above case was determined appear so obviously rational, and at the same time so perfectly conformable to the rules and analogies of the law, and as the question in controversy was decided by a Court of such great authority and by one of the most eminently legal men of the age, the decision will, no doubt, be received as fully establishing the law in this country with regard to the right to seaweed." From these authorities it appears that the riparian owner has a right, in common with the public at large, to take seaweed while floating in the sea, and that he has the exclusive right to it when deposited on the shore. Now if such be the nature of the riparian owner's right, with respect to seaweed, may he not, like the fisherman, use such contrivances as his own skill, or the peculiar circumstances of different localities may suggest for catching it while floating in the sea, or securing it against being drifted away after it has become his property by being deposited on the shore. Admitting, for the *present*, that the public have a right of way over the shore, still, like the owner of the vessel whose right of sailing in any direction is, to a certain extent, interfered with by the fisherman's *nets*, so the public right of passing along the shore may, to a certain extent, be interfered with by the contrivances of the agriculturists used to catch or secure seaweed. Again, if he can lawfully use artificial means to promote or induce alluvial deposits, and

if seaweed be a subject for forming such deposits, is not that decisive as to his right to erect this wier? The question in each case must be, has the right of fishery, securing seaweed, or promoting alluvial deposits, been exercised in such a manner as (not theoretically but practically) to interfere with the fair, useful and legitimate exercise of the right of navigation on the one hand, or of passing along the shore on the other. If it has it is a nuisance. If it has not, the public are not injured, and it is not a nuisance. In the words of *Best*, J., "the law in such cases limits and balances opposing rights that they be so enjoyed as that the exercise of the one is not injurious to the others."

Many cases where wharves were indicted for obstructing navigation were cited and commented on during the argument. In such cases the defendant has more difficulty in justifying the erection than in this. Where a wharf is erected there can be no balancing of nuisances, or rather the convenience of one class against the inconvenience sustained by another (the case of *Rex v. Russel* 6 B. & C. 566, where his doctrine *seems* to have been held was disapproved of by the Court of 2 B. in *Regina v. Betts* 22 L. & Eq. Rep. 257, and subsequently overruled in *Rex v. Ward* 4 ad. & Ell 406) because the public and every class of it have a right to an *unlimited navigation* of the water and wharves, though necessary for unloading of vessels, are not erections made under authority, or in the exercise of any privilege which the person making them has a right to enjoy. They are in law purprestures which, *whether a nuisance or not*, may at any time be abated by the Sovereign as owner of the shore or soil in which they stand (which, of course, is never done by the Sovereign unless the public good requires his intervention.) But if they really do obstruct the navigation so that *any class* of the public are inconvenienced, they are also a nuisance, *Angell* 98. *Rex v. Russel*, 18 Jur. 1022. Yet, even then the defendant may shew that the injury to all is absorbed in the greater benefit conferred on all by the erection. But when the act complained of is due in the exercise of a legal right, as that of fishery, or collecting seaweed the law regards the rights of both. This distinction is alluded to by Lord *Denman*, in *Rex v. Ward* he says, "but the learned Counsel contend that they did not want the authority of *Rex v. Russel*, and could establish their right to a verdict of not guilty on the finding of the Jury from a consid-

eration of the nature of the place where the nuisance is charged. They say the river *Medina*, as described in the indictment, is not merely a navigable river, but a *port Cowes Harbor*, and they rely on the *various rights that may exist together in such a place and their unavoidable inconsistency at particular times.* The same remark may, however, be true with respect to a highway where right of common and right turbary may exist at the same time. It is still more strikingly true in respect of navigable rivers from which it seems impossible to distinguish the case of ports in principle, though the *degree* may perhaps be different. When such rights happen to clash in questions brought before the Courts the valuable maxim '*sic utere tuo ut alienum non Cedas*' will generally serve as a clue to the labyrinth."

" But the possible jarring of pre-existing rights can furnish no warrant for an innovation which seeks to create a new right to the prejudice of an old one."

Is not the real effect of the finding in this case that the defendants have exercised their own right so as not to injure the right of others?

In considering the case, I have so far assumed that the public have the same general right of passage over the shore between high and low water mark with carriages when the tide is out that it has over it in boats when covered with water, and even on that assumption this finding is an acquittal.

But the truth is, that it has not, in law even that general right, but that any *right* it has is one of a much more limited or rather of a different description. The property in the soil between high and low water mark is in the Sovereign, yet it is said to be also of common right public. But this public right appears from Lord *Hale* to be the public right of navigation for the purpose of trade and intercourse, and also, the liberty of fishery. But that is a very different thing from the general *right* of way set up here, and which must exist before (on this finding) judgment can be given against the defendants. It may be that the public, as incident to their right of navigation and fishery, have a right of way across the shore for purposes connected with those privileges, but that right must be exercised with due regard to other equally well recognized rights. It does not follow that because a man has a right to land his fish on the shore between high and low water mark or to draw his boat up on it, or because he has a right to collect seaweed

floating in the sea or growing below low water mark, that he must also have a right to drive his wagons for 50 miles along the shore. The *right* of way claimed here is not confined to any particular place. If it exists at all it must (as urged by the *Attorney General*) exist over every part of the sea shore, and it must, therefore, swallow up every other right which in the least degree interferes with its unlimited and capricious exercise. The same principle which would compel the Court to decide for sweeping away this erection, though found by the Jury to cause no public injury, might be used to sweep away every building, wharf and erection upon the shore of all the bays and rivers of the Island. If there be this same general *right* of way over the space between high and low water mark when the tide is out as there is along a highway on land, how can stakes, nets or other fishing fixtures be placed there? How can those stages of wood, or ways of stone and brush we so often see on the shores, and which are, in some situations, so necessary for unloading fishing boats at low water be maintained? To be useful, they must extend below ordinary *high water* mark and, therefore, must obstruct or interfere with that universal right of way which, as claimed, extends itself over every part of the shore between high and low water mark. If I sink a post in the street to tie my horse to, it would be a nuisance. But would any one imagine that the man who keeps a stake in the shore to fasten his boat to, is guilty of an indictable offence?

These reasons are not new, they are the same as those used by *Holroyd*, *Bailey* and *Abbott*, in the elaborate judgments delivered by them in *Blundell v. Catteral* 5 B. & A'd. 91. In that case the right of soil in the land between high and low water mark had passed from the Crown to the plaintiff. But as the *King* though he may part with the soil of the sea shore, cannot by so doing abridge the public rights in the sea or its shores, and as the defendants failed in establishing a prescriptive right, then circumstances made no difference further than in enabling the plaintiff to maintain trespass *quaere clausum fregit* provided the defendants would not, against the King, have had the right of way contended for. The defendants there claimed a common law right of bathing in the sea and, as incident thereto, a right to pass along the shore with carriages, &c. *Holroyd* in his judgment says, "by the Common Law all the King's subjects have, in general, a right of passage

over the sea with their ships, boats, and other vessels for the purpose of navigation, commerce, &c. These rights are noticed by Lord *Hale*. But whatever further rights (if any) they may have in the sea, it is a different question whether they have or how far they have, independently of necessity or usage, public rights upon the shore (that is to say between high and low water mark,) when it is not sea, or covered with water, and especially when it has from time immemorial been, or since become private property. And after a long examination of the authorities he says this "shews that by the Common Law the King's subjects have not a general right to use the sea shore as they please even when the soil remains in the King clothed with the *jus publicum*." *Bayley*, J., after arguing in a similar manner on the authorities, says, "the right, as claimed, is not confined to any particular place if it exists at all, but it must exist upon every part of the sea shore. Every private building then erected upon the sea shore and even wharves and quays would be an obstruction to that right and, of consequence, abatable or indictable. And yet in how many instances are such buildings, wharves and quays erected? Every embankment by which land is redeemed from the sea would obstruct the exercise of this right and be a nuisance, and so would the erection of stakes for holding nets. And yet how frequently are such embankments made and stakes set up?"

And *Abbot*, J., says, "there being no authority in favor of the affirmative of the question in the terms in which it is proposed it has been placed in argument at the bar on a broader ground. And as the waters of the sea are open to the use of all persons for all lawful purposes it has been contended as a general proposition that there must be an equally universal right of access to them for all such purposes over land like the present. If this could be established the defendant must, undoubtedly, prevail, because bathing in the sea is, generally speaking, a lawful purpose. But, in my opinion, there is no sufficient ground, either in authority or reason, to support this general proposition."

The authority of this decision has been questioned by two text writers, but it is cited with approbation by Chief Justice *Kent* 416, and by him considered as overruling *Bagot v. Orr* 2 B. & P. 478, and must be considered good law.

It may be asked if the public have no right of way along the shore between high and low water mark? Are they

altogether debarred from using it? Certainly not. The right of property in the sea and the soil at the bottom and, also, of the land, between high and low water mark, is in the Sovereign, but, though the King has the property, the people have the necessary use. But these rights of use are only the right of piscary and navigation, and these are called public rights and are denominated *jura publica* or *jura communa* to contradistinguish them from *jura corona* or the private rights of the Crown. These public rights are said to exist of *common right*, which is only another epithet for Common Law. With respect to these public rights (viz., navigation and fishery) the King is, in fact, nothing more than a trustee of the public, and has no authority to obstruct, or grant to others any right to obstruct, or abridge the public in the free enjoyment of them. But subject to those public rights the King may grant the soil of the shore and all the private rights of the Crown with it. Yet, until he does so, he holds the soil clothed with the *jus publicum*, and while the soil thus remains the King's no unnecessary or injurious restraint upon the public, in the use of the shore, would be imposed by the King the *parens patriæ*. And he does in fact, and tacitly permits all his subjects to use the shore between high and low water mark, as when and how they please, so as, in doing so, one class do not attempt to monopolize it to the injury or exclusion of another. And it is by virtue of this *acquiescence* of the Crown that the public in general exercise the right of passing along the shore between high and low water mark during the reflux of the tide. But this permissive use, though allowing all the enjoyment and exercise of a public way, which can be reasonably desired, is very different in its legal effect or operation on the rights of others from that absolute *common law right of way* attempted to be established here, and which is paramount to, and destructive of every right (no matter how important) which clashes with it, and which could, therefore, compel every part of the shore to be kept free from obstructions of any description.

Science and the ingenuity of man are constantly offering new inventions for the benefit of trade, manufactures, agriculture and commerce. Many of these can only become practically useful when located on the sea shore. Our newspapers are now urging the introduction of one of the most useful of these modern inventions into this Island, but if the use of the shore by the public, as a way, be not *merely permissive*, but of com-

mon right, by what authority could a Marine Railway, which must extend below low water mark and, therefore, leave no Passage, be erected or maintained? The Jury would be compelled to find that it obstructed the way, and it must be adjudged a nuisance. But, further, as every man may justify the removal of a common nuisance, every individual might cut it down with impunity. But the right exercised under the permissive use justifies no such outrage, tolerates no such monopoly, but adjusts itself to suit the peculiar circumstances of different localities, and the ever varying requirements of public convenience. As observed by *Bayley*, J., in *Blundell v. Catteral*, "the shore cannot be necessary for the exercise of this supposed right, and that it may be desirable to apply parts of the sea shore to other purposes. The King, for the public welfare, may suffer such a right to be exercised in those parts of the shore which remain in his hands, to any extent which the convenience of the public may require, but he may not, also, allow other rights to be exercised on other parts."

One topic urged at the bar against this erection, was the inconvenience and contention it might lead to, as every one might make a similar erection in front of another's land. But a little examination of the law respecting the rights of riparian owners, will shew that no such inconvenience can arise. No one but the owner of the adjoining land has a right to place any erection in front of it, because his right of way, in a direct line from every foot of his bank to the water, cannot be, in any degree, abridged, and because he has other rights of a private nature connected with the water which are paramount to all others and cannot be lawfully interfered with. Every man may build a wharf in front of his own land if it does not interfere with the navigation. But the King, though owner of the soil of the shore, cannot license a man to build in front of his neighbor.

Angell, p. 161, after shewing that lands between high and low water mark may be reclaimed by embankment, anticipates and answers this very objection. He says, "it may also be urged that if the right of embanking in and upon the sea is founded on the principle of prior occupation, it is then not confined to the owner of the upland, to the exclusion of any other person who may first commence an embankment. The answer to this objection is as follows:—should an individual, who has no interest in the upland, embank upon the shore between high

and low water mark, he would, obviously, interfere with rights of a private nature, as he would, by such intervention, shut out the owner of the upland from the water to which the latter, as riparian proprietor, is most unquestionably entitled." And in the case of *Bowman v. Watham*, cited *Angell* last Ed. 171, in the Circuit Court of the *United States*, *McLean*, J., in respect to the *Ohio River*, (which he puts upon the same footing as navigable tide waters) says, "it is enough to know that the riparian right on the *Ohio River* extends to the water, and that no supervening right, over any part of this space, can be exercised or maintained without the consent of the proprietor. He has the right of fishery, of ferry, and of every other right which is properly appendant to the owner of the soil, and he holds every one of these rights by as sacred a tenure as he holds the land from which they emanate. The State cannot, either directly or indirectly, divest him of any one of these rights, except by the constitutional exercise of the power to appropriate private property for public purposes. And any act of the State, short of such an appropriation, which attempts to transfer any of these rights to another without the consent of the proprietor, is imperative and void, and can afford no justification to the grantee against an action."

We might have disposed of this case on narrower and more technical grounds, but the Attorney General, on the argument, pressed us for a decision on the points expressly raised to determine a question of much public importance. The case was argued at great length and with great research on both sides. Every authority bearing on the question was brought forward and very ably discussed. We have, during the recess, given it the careful consideration which its importance demanded. In stating the reasons for our decision the examination of the authorities has led us to a length which may be considered prolix, but it is difficult, very briefly to explain distinctions respecting rights of this nature, without leaving one's meaning open to doubt (at least to question) which, as this decision will probably, settle a question, heretofore, prolific of disputes, is, if possible to be avoided.

The Judgment must be entered for the defendants.

CAPELL *v.* CAPELL.

Chambers.
Aug. 21st 1865.

Judge at Chambers will not discharge a prisoner committed by Court of Governor and Council for contempt in not paying alimony pursuant to decree.

This is an application on *Habeas Corpus* to discharge a prisoner committed by the Court of Divorce (for refusal to pay alimony decreed to be paid by him) on the ground that the Court has not the power to enforce its decree by attachment. I incline to think that the 5 *Wm.* 4 c. 10, which constitutes the Governor and Council "a Court of Judication in the matters and premises aforesaid with full power and jurisdiction in the same," intended to give this power to enforce its decree.

It is, no doubt, true that where a Statute creates a tribunal to put in force laws of the mother country, which were previously dormant for want of a Court to administer them, the new tribunal must follow the principles and, as far as possible, the forms of procedure usual in Courts having cognizance of such matters in *England*. But in this country one (and indeed the most effective) mode of enforcing a decree used in *England* (*viz.*, excommunication) cannot be employed, as we can hardly presume the Legislature intended to give that power to the Governor and Council. And, therefore, it would seem reasonable to suppose that while the Legislature intended the new tribunal to adhere to the principles followed in administering that branch of law in *England*, it did not intend to restrict it in every particular to the English practice, but left it to adopt one more fitted to the circumstances of the country in which its functions were to be exercised. But I pronounce no decided opinion on this point. If it were necessary to do so, I should require to give a more careful examination to the authorities than I have done.

The ground on which I feel myself bound to discharge this application is, that the party is committed by a Court having power to adjudicate on the subject matter, viz., divorce and alimony, and, therefore, I think a Judge at Chambers has no power to discharge him where the complaint is merely that the mode adopted to enforce obedience to a legal decree is irregular. If such is the case he must resort to his action at law for redress.

I must, therefore, discharge this application with costs.

THE QUEEN v. GORBET & ORS.

Hilary Term, 1866.

Criminal law—Indictment quashed because agent of prosecutor on Grand Jury who found Bill.

This is a motion to quash an Indictment found against the defendants for conspiracy, riot, and unlawful assembly. The object of the alleged conspiracy, stated in the Indictment, being to hinder and obstruct *Col. Cumberland* in the recovery of his rents and, for that purpose, to hinder and obstruct the Sheriff and his officers in serving writs on his tenants. The Indictment also contains counts for assault on the deputy Sheriff and his bailiff's while attempting to make such services.

It appears by the affidavits one of the Grand Jury, Mr. *Charles Wright*, who sat on the finding of the Bill, was the agent of *Col. Cumberland*, for the collection of the rents and the general management of his Estate, and, as such, directed the issuing of the writs, in attempting to serve which the deputy Sheriff and his bailiffs were so obstructed and assaulted The motion is made on two grounds.

First. That Mr. *Wright's* position was such as would, naturally, cause him to have an undue influence, or prejudice against the accused.

Second. That as the assault and obstruction was against the deputy Sheriff and bailiffs the High Sheriff must, therefore, be presumed partial and, therefore, the whole panel is open to objection.

A finding of twenty-four impartial jurors is required by our law to convict one accused of a criminal offence. If a petit juror is of kin interested, or not indifferent, there is no doubt he may be challenged as he comes to be sworn. It is laid down, with respect to Grand Jurors, in ch. co. Law 309, that if a man who is disqualified be returned, he may be challenged by the person before the bill is presented; or, if it be discovered after the finding, the prisoner may plead in avoidance and answer over to the felony on producing the record of outlawry attainder, or conviction on which the incompetency of the juryman rests. This necessity for the Grand Inquest to consist of men free from all objection existed at Common Law, and was affirmed by the Statute 11, *Hen.* 4, c. 9, which enacts that any Indictment taken by a Jury, one of whom is unqualified, shall

be altogether void, and of none effect whatsoever. So if a man be outlawed upon such a finding he may, on evidence that one of the Jury was incompetent, procure the outlawry against him to be reversed. It is clear that a defendant before issue joined may plead the objection in avoidance, but if he take no such exception before his trial it seems doubtful how far he can afterwards take advantage of it, except it be verified by the records of the Court in which the Indictment is depending, in which case any one as *amicus curiae* may inform the Court of the objection.

But it is urged by the Attorney General and the Counsel for the crown, that though interest or relationship may be objected against a Grand Juror, mere circumstances which shew only ground to suspect undue influence or prejudice, and which might form ground of challenge to a Petit Juror, are not a sufficient objection to a Grand Juror's duties to enquire after all offences, and the *ex parte* nature and inconclusive effects of their decisions are urged as a reason for this distinction.

But there seems no sound reason for this distinction. If a man cannot be convicted without the voice of 24 Jurors, is it not against all reason to say that though 12 of them must be impartial, the other 12 need not? If impartiality is required in one body, why not in the other also? Instead of a protection the body not required to be impartial might, in many cases, only create undue suspicion against the accused. The more general nature of their duties can afford no compensation to an accused who has suffered from partiality of all, or any of those by whom he has been condemned.

The great object of the institution of the Grand Jury is to prevent persons being even called on to answer for alleged crimes without reasonable ground for accusation. It has been described by great jurists as the grand bulwark of civil liberty —their proceedings are conducted in secret, so that an accused or suspected person may not, without reasonable proof of guilt, suffer the mortification of a public trial. If individuals, who were actors on either side in transactions which form any material part of the subject matter of an accusation, could sit as Jurors in deciding whether an accused should be subjected to a public trial or not, the principal object of the institution might, in many cases, be defeated.

But we are not without express authority on this point. In

a note to *Chitty's Criminal Law* 309, it is said, "there exists the same rights for challenging for favor the grand jury as the petit jury, Burr's Trial, 38."

The authority cited, it is true, is an *American* decision, but the general principles of law applicable to such cases are the same in the *United States* as here, and that decision only follows what has been already decided in the Queen's Bench in *Ireland* in *the King v. Kirwan*, 31 State Trials 543. Lord Chief Justice *Downs* says, "it would be monstrous to say that an illegal Grand Juror should find an Indictment, and that the man accused should have no mode to avoid it."

This brings us to consider whether the circumstances stated in the affidavits respecting Mr. *Wright* support the objection. *Chitty*, in his Criminal Law, 543, lays it down that "the third description of challenges are those which arise *propter affectum*, or on the ground of some presumed or actual partiality in the juryman who is made the subject of objection, for the writ requiring that the Jury should be free from all exception, and of no affinity to either party, must, evidently, include both these grounds of challenging; thus, if a juryman be under the power of either party, or in his employment, or if he is to receive part of a fine upon conviction, or if he has been chosen arbitrator, in case of a personal injury, for one of the parties, or has eaten or drunk at his expense, he may be challenged by the other; so if there are actions depending between the juryman and one of the parties, which imply hostility, that will be good ground of principal challenge."

Could *Col. Cumberland*, whose rights it was the alleged object of the conspiracy to obstruct, have been considered free from such reasonable suspicion of undue prejudice as alluded to by *Chitty* and, therefore, not liable to challenge if called as a Petit Juror. The Counsel for the Crown at first contended that he would, but on examining the Indictment they, very properly, abandoned that idea, but then they contend that though *Col. Cumberland* might be challenged, his agent was not, necessarily, open to the same objection. But we think it impossible, under the circumstances of this case, to hold that an objection, good as to the principal, is not equally good against the agent. Mr. *Wright* was the agent for the collection of these very rents which it was the object f the alleged conspiracy to prevent being recovered; he, in fact, instituted the legal proceedings against the tenants from whom they were

due; and, though he might have no pecuniary interest in their recovery, yet he might, very reasonably, be presumed to labor under what was aptly described by Mr. *McLeod* as that ruffling and irritation of the mind, naturally felt by one who has been engaged in conflict with those suspected of a combination against him, or who have by predetermined violence or intimidation prevented, or attempted to obstruct the due course of proceedings which he (though on another's behalf) may have instituted against them.

The motion is, in substance, a plea that Mr. *Wright* was incompetent; and, as the facts, in our opinion, sustain the objection, the Rule for quashing the Indictment must be made absolute.

BRECKEN & UXOR v. WRIGHT.

IN CHANCERY,
Dec. 16th, 1867.

Construction of Will—acquiescence.

In this case the plaintiffs filed their Bill to compel payment of an annuity charged by the Will of *George Wright*, the father of the complainant, *Phoebe Brecken*, and the defendant on lands devised to the defendant. On the 11th December, 1841, the testator made his will devising certain freehold property to his wife, *Phoebe Wright*, for life, and after her decease, to the defendant, and, by a subsequent clause, directed that the lands so devised "should be subject and chargeable with the support and maintenance of his said daughter *Phoebe* in a manner suitable to her station in life. And in case any dispute should arise with respect to the inadequacy or insufficiency of such maintenance, then that the sum of £30 per annum should be paid to the said plaintiff, *Phoebe*, in lieu thereof." By a codicil dated 11th December, 1841, the testator directed that, in case any dispute should thereafter arise, touching the maintenance of his said daughter *Phoebe*, as mentioned in his said last will, then he directed that she should receive, annually, out of the rents of the said property, referred to in his said will, the sum of £40 instead of £30 as therein mentioned. The testator died in March, 1842. The plaintiff, *Phoebe Brecken*, continued to reside in the homestead

with her mother and the defendant up to May, 1844, when she married the plaintiff, *Ralph Brecken*, and she and her husband continued to reside with her mother and defendant for 18 months after the marriage, when they removed to his house. *Phoebe Wright*, the mother, died on the 20th December, 1851 and from that period up to the 12th November, 1860. the defendant duly paid the annuity of £40 to the plaintiffs, when he discontinued the payment and has since paid nothing. A large part of the answer, the evidence and the arguments are pointed to the circumstances of the testator and his family for the purpose of indicating his intention and, thereby, to influence the construction of the words used in the will. But there is no latent ambiguity, or, as Lord *Bacon* calls it, equivocation here, and I can only look at the words within the four corners of the will, and must refuse to consider any extraneous facts or circumstances.

The testator, in very explicit language, gives his daughter maintenance, and in case of any dispute as to its inadequacy or insufficiency, fixes it at £40 a year. The defendant contends that there is no dispute as to its adequacy or sufficiency and, therefore, he is not liable to pay the £40 in money.

The testator evidently contemplated that a maintenance supplied in some other way than by a money payment might, in the then circumstances of his daughter, be most convenient for all parties; but to secure her against annoyance and the devisees against excessive expenditure on her account, he provides that in case of any dispute respecting the inadequacy of the maintenance, she is to have an annuity of £40. Now it seems to me—having regard to the testator's object—the words "any dispute respecting the inadequacy," must be construed to make her the sole judge whether the kind of maintenance provided is adequate or not, and that she was, therefore not bound to assign any reason for objecting to it, but could, at any time, insist on payment of the £40 in money, and that the demand of that sum on her part, and a neglect or refusal to pay it by the defendant, constituted such a dispute as was contemplated by the testator.

But suppose such a dispute as is contended for was a necessary preliminary to her right to insist on payment of the £40 in money. The meaning of the word "dispute," as defined by *Webster*, is, to argue, to reason, to discuss. The defendant in his deposition states "that after the death of his mother,

Phoebe Wright, he, on being *strongly urged* so to do by the complainant, *Ralph Brecken*, and because the defendant did not wish that any *disturbance* should arise between parties so nearly connected, paid the money." Now, it is impossible to read this admission without coming to the conclusion that there must have been reasoning, arguing, or discussion respecting the demand for a money payment of the annuity, and that of a character to convince the defendant that a refusal to comply with the demand would be followed by an attempt to enforce it, or he would not have *feared* that a noncompliance would create disturbance between them. There *was*, therefore, a "*dispute*." The meaning of the word inadequacy is "*the quality of being insufficient for a purpose*." The purpose to which the word here refers is the maintenance of this lady in a manner suitable to her station in life. Now, though board and lodging provided for a young lady in her mother's house might be very convenient and suitable to her station in life and, therefore, a very adequate maintenance for her while single, it would be a very inadequate maintenance for her when she became a married woman, because that mode of providing it would not be convenient for her, and not suitable to her then station in life, and, therefore, I think the fact of the marriage and removal to her husband's house is sufficient evidence, and *was* notice to the defendant that the maintenance, as previously furnished, was not, and had ceased to be considered adequate for her in her then station of life, and coupled with the demand for payment in money and neglect or refusal of the defendant to pay clearly constituted (in the words of the will) a *dispute respecting* the inadequacy of the maintenance.

If any evidence were wanting, the defendant's letter to the plaintiffs' Solicitor of the 2nd June, 1864, supplies it.

June 2, 1864.

GENTLEMEN,

I received your note of the 28th of May, requesting payment of £140.

I have not been able to understand what right Mr. *Brecken* has to demand £40 a year of me in cash. *If he cannot support his wife* I am agreeable to do so from this 2nd day of June, 1864. He can let me know on cea month, or oftener, what he requires, and I will furnish every thing requisite necessary for her support.

If he wanted the annuity paid (about which he harrassed the last years of my mother's life and gave her to understand that

if she wanted law she should have it) he should have demanded it in items that he required for the support of my sister &c.

BENJ. WRIGHT.

After paying nothing for 4 years he expresses his surprise that money is demanded, but promises, if the plaintiff, *Ralph Brecken, is not able to support his wife*, he will furnish such things as plaintiff may demand, monthly, for the future. Now, if an argument could be raised as to a dispute about adequacy, surely the paying nothing for 4 years and *denial of legal* liability to pay anything for the future, would be an answer to it, as nothing at all would be an inadequate maintenance indeed.

It is unnecessary to consider whether the paying for 9 years in money is an acquiescence which would now preclude the defendant from objecting to that arrangement. But I think that the defendant *being clearly chargeable with the maintenance*, and having on his sister's marriage, and at her request, substituted a money payment in lieu of that previously adopted, could not, after acting for 9 years on the new arrangement, repudiate it and go back to the first without his sister's consent *merely* because some *formal* dispute had not taken place before the last arrangement was adopted, his right to insist on such a formal dispute (if it had existed) would be waived by his subsequent conduct.

In every way in which this case can be looked at, I find the defendant is wrong, and the plaintiffs are entitled to the relief prayed.

Let it be referred to Master *Longworth* to take an account of what is due to the complainants for the arrears of the annuity of £40 annually given to the plaintiff, *Phoebe Brecken*, by the will and codicil thereto of her father, *Geo. Wright*, in the Bill of Complaint in this cause mentioned, and which have accrued due since the 12th day of November, 1860, and to tax the plaintiffs their costs of this suit. And it is ordered that the amount found to be due from the defendant for such arrears, together with the costs to be taxed, be paid by the defendant to the plaintiffs. And that any of the parties shall be at liberty to apply to the Court as occasion shall require.

E. J. HODGSON v. THOMAS DAWSON.

Chambers,
Dec. 24th, 1867.

Application for time to plead—on what terms order granted.

I should have hesitated to grant the order in this case if the plaintiff had sued the defendant simply as *endorser* of the notes. But one special count alleges the money to have been advanced to *W. B. Dawson* as defendant's agent, and at defendant's request, and for his own use, and that the notes were deposited with plaintiff as a collateral security for the benefit of both plaintiff and defendant. The defendant swears that it is necessary to obtain information from *W. B. Dawson* relative to his dealings with plaintiff to enable him to plead, and with respect to this special count this may be the case. But the defendant does not state in what part of the *United States W. B. Dawson* is, though from his affidavit I must presume he could and would have done so had he been very distant. Under the circumstances I think 4 months would be an unreasonable delay to impose on the plaintiff. As suggested by the plaintiff's Attorney, it would likely throw the trial over the next Trinity Term, and I think that 2 months is sufficient if the defendant use diligence, and the order will be for two month's time to plead on the usual terms.

LEFURGEY v. M'GREGOR & M'NEILL.

Hilary Term,
Feb, 5th 1868.

Contract construction of—distinction between liquidated and unliquidated damages.

The defendants agreed to build a vessel for plaintiff. The agreement contained the following clause, "the said vessel to be finished, launched, and completed on or before the first day of August next. The said defendants, hereby, agreeing to pay the plaintiff £4 10s per day for each and every day the said vessel shall be detained after the said first day of August, by reason of the noncompletion of the said agreement."

The defendants, at the time, executed a Bond and Warrant of Attorney authorizing judgment to be entered against them

at the suit of the plaintiff for £700. The condition to the Bond being as follows, "that if the said *Peter McGregor* and *Michael McNeill* deliver afloat on *Grand River* a vessel of about 192 tons Register to be finished on or about the first day of August next, according to an agreement bearing even date with these presents, then this obligation to be void."

The vessel was not delivered for 105 days after the first of August which, at £4 10s per day, would amount to £420.

An account between the plaintiff and defendants was made up shewing a balance of £738 due the plaintiff, and this account was acknowledged and signed by defendant *McNeill*. The £420 for detention formed part of this balance.

The plaintiff entered Judgment and sued out execution for £700.

A Rule *Nisi* was obtained to shew cause why the Judgment and execution should not be set aside.

It was urged by defendant's Counsel that the £4 10s per day is not liquidated damages, but in the nature of a penalty. And, secondly, that at all events, the condition of the Bond does not apply to any damages beyond, or in respect of breaches not covered by the stipulated amount.

It is unnecessary to advert to the arguments and numerous authorities cited to shew that the £4 10s per day is in the nature of stipulated damages.

The general rule established by the authorities seems to be that when an agreement contains several stipulations some of them relating to matters of great importance to the parties, and others of little or no importance, a covenant for liquidated damages generally upon any violation of the agreement shall not be carried into effect *however strong the language may be.* But if the agreement contains only a single stipulation, or the covenant for liquidated damages be confined to any *specific* breach or breaches where the agreement contains more than one stipulation, such covenant is valid and may be enforced. Though the application of the rule may, in some cases, be difficult, in the present case it is clear that the agreement to pay £4 10s per day relates to the time stipulated for the delivery of the vessel, and was intended as a conventional arrangement between the parties fixing a definite sum as compensation for damages (in their nature uncertain) which the plaintiff might sustain if the appointed time of delivery was postponed. But the language of the condition of the Bond only points to the

particular stipulation for delivery at the time agreed upon, and had the delivery been made at that time, the condition would have been performed and the Bond would, thereby, have become void. Therefore any damages sustained by the plaintiff in respect of breaches of other stipulations in the agreement or for advances made to the defendants though they might be recoverable in an action could not be covered by the Judgment entered on the Bond.

The levy must, therefore, be reduced, but must stand for £420 and costs of the Judgment, execution, &c, and of the costs of this Rule, to be taxed and added to the levy. And on payment in satisfaction of the said sum, £420, with costs of the Judgment, execution and incidental expenses, and the costs of this Rule to be taxed, the Judgment must be marked satisfied.

HASZARD v. THE MUTUAL INSURANCE CO.

Hilary Term, 1868.

Pleading—duplicity—general allegation of fraud sufficient where alleged fraud lies in knowledge of opposite party—amendment after demurrer argued, when allowed.

The declaration in this case averred that the plaintiff, immediately after the fire, did send in as particular an account of the loss as possible. The 4th plea was as follows:—

"And the defendants for a further plea &c *actio non* because they say that the said plaintiff did not as soon as possible after the said loss and damage in the said first and second counts mentioned, send in as particular an account of the said loss and damage as the nature of the case admitted of in manner and form as the said plaintiff hath above in these counts alleged. *Nevertheless* for plea in this behalf the said defendants say that in the claim made for the said loss and damage in the said first and second counts mentioned and set forth, there appeared to be fraud within the true intent and meaning of the said ninth condition referred to and annexed to the said Policy, that is to say, fraud in taking and estimating the quantity, nature and value of the goods &c., in the counts, supposed to have been burnt &c. contrary to the said ninth condition &c, verification."

The fifth plea, which is also demurred to, is clearly bad and there must be Judgment on it for the plaintiff.

To the fourth plea there was a special demurrer, on the ground of duplicity, and that the allegations of fraud are too general.

The plaintiff's counsel urge that the sending of the account is traversed in the first part of the plea, and that the not sending such account, or the fraud alleged in it, is, either of them, an answer to the action and, therefore, the plea is double. And, undoubtedly, if the plea professes to rest on both as a defence, that would be the case. But does not the plea in substance amount to merely this? You, the plaintiff, did not as soon as possible send in the particular account of loss as you have alleged, but, notwithstanding, *i. e.* waiving or not insisting on that, I say that in the claim you did make for the loss, there appeared to be fraud within the meaning of the ninth condition. If this be the real meaning of the plea, and I think it is, there is no duplicity, as fraud alone is insisted on as a defence. "Nevertheless for plea in this behalf" is an elliptical expression. The antecedent denial shewing that the words waiving or not insisting on that, are omitted. But besides this the law is clear that underwriters *lose* their right to insist on *preliminary proofs* by objecting to the *loss on other grounds*. "Thus where a policy required, as a preliminary proof, a statement as to assured's ownership of the building and its being free from encumbrance, the right of the underwriters to insist upon such a statement was held to be waived by their objecting to the loss on other grounds." *Underhill v. Agawam* 6 Cushing (Mass) Rep. 220, cited in *Phillips Ins.* 504. Therefore when this plea denies that a proper account was sent in, in proper time, and yet that defendants objected to it when sent in on *other grounds*, viz., fraud, it shews that the defendants' *right* to object to the account either for delay in sending it in, or for want of sufficient particularity, is not only not insisted on, but actually does not exist. That right (if it ever existed) being in law extinguished by the facts stated in the plea, no plea could be freer from the objection of duplicity. In the numerous cases cited on the argument, the question was not whether the *several* denials or allegations professed to be or were put forward as a defence, but whether looking at them as used with that intention they really constituted two defences.

Exactly the same form of plea is given in the 5th Edition of

Chitty on Pleading, Vol. 3, p. 2016, and is inserted in the 6th Edition of the same work published in 1857 without alteration. And *Chitty, junr.*, in his precedents, gives a form in *assumpsit* omitting the introductory part here objected to, but for a plea in covenant refers to the form in *Chitty on Pleading* above cited. But it seems to me either form would be good. The pleader here seems to have fallen into error from looking at the averments separately without considering the legal effect of the whole plea.

As to the other objection that the charge of fraud is not sufficiently specific, it seemed to me at first that the plea might be open to this objection. But the authorities are clear that where the alleged fraud lies within the knowledge of the opposite party such general plea is sufficient.

As by Judgment for the defendants on this demurrer the plaintiff would from a simple error on a mere *formal* point of *special* pleading lose a very large sum of money to which the trial and verdict has shewn us he is entitled, we think we are bound to exercise our discretion and permit him to withdraw his demurrer and reply. But as an issue will then arise to be disposed of by a Jury, the verdict must be set aside and a new trial had on all the issues.

The plaintiff to have leave to withdraw his demurrer and reply. The verdict now standing to be set aside and a new trial granted, the costs of the former trial to be costs in the cause.

IN RE GEO. M'KAY.

Hilary Term 1868.

Insolvent Act.

Held that an assignment to a creditor by an insolvent person after service of process under pressure did not deprive prisoner of right to weekly allowance under Insolvent Act.

See *Arnell v Bean* 8 Bing. 87. *Morgan v. Horseman* 3 Taunton 241, *Doe d. Boydell v. Gillett*, 2 C. M. & R. 579, *Prumer & ano. v. Parnell* 4 M. & W. 348.

SANDERSON, APPLT. v. HAYDEN, RESPDT.

Easter Term, 1868.

Appeal from Commissioners' Court—notice not entitled in any Court bad.

In this case, Trover, the pig in dispute clearly belonged to the appellant. But it was objected that the Notice of Appeal was bad, it not being entitled in *any* Commissioners Court, and as it was said that there had been a previous decision on the point, I reserved Judgment. On enquiry I find a notice so entitled has been held bad. And there is no doubt that such a notice is not substantially in the form given in the Schedule to 23 *Vic. c.* 16, in which the title of the Court is set out and which, by the 29th sec., it is required to be.

The appeal must, therefore, be dismissed with Attorneys' costs and Counsel fee in this Court to be taxed. But, under the circumstances, no mileage or witnesses' fees will be allowed to the Respondent.

THE UNION BANK v. THOMAS DAWSON.

Chambers. June 6th, 1868.

Application for Commission to examine witness abroad—where circumstances suspicious, affidavits must state facts excusing delay in making application fully—and allegations must not be argumentative.

This application is for a commission to examine a witness, *W. B. Dawson*, abroad.

From the plaintiff's affidavits it appears that defendant, *Thomas Dawson*, is the father of *W. B. Dawson*. That defendant was connected with his son in business, and that in October last the son absconded (having committed forgeries) making an assignment of his property to the defendant and others as trustees. That defendant accepted the trust and claims to be a creditor of his son's to a large amount.

In *Hilary* Term last the trial was postponed on the affidavits of the defendant stating that one *George Nicoll*, resident in *California*, was a necessary witness. The defendant now

makes application for a commission to examine his son, *W. B. Dawson*, alleging that his (defendant's) name, as indorser of the notes discounted by his son, is forged, and that the commission will be of no use unless the trial is put off. The defendant alleges as an excuse for not making the application earlier that he did not know where his son was to be found. The affidavit of the defendant and his attorney is, in some respects, very circumstantial as to the *steps* taken to discover his son's residence, but neither of them *distinctly swear* that they did not know where he could be found, but leave that to be inferred argumentatively from the narration of their alleged endeavors to find him out.

The defendant and his attorney both admit that they have been all along in communication with the son, but that the letters from the son, and theirs to him, passed through the medium of a third person, but neither the name or address of such third party has been given. Indeed there appears in the affidavit to be a studied concealment of facts which I should in such a case expect to be fully stated.

After hearing the argument of Counsel, and carefully reading the affidavits, I cannot believe that the defendant was unaware of where his son was, or, at all events, that he could not have found it out, if he really desired to do so. Now that he is aware of it, he declines to disclose it, but says he has arranged with his son to come to *Calais*, in the *United States*, to be examined. Now, considering that it is a case between father and son who has absconded assigning all his property to the former, and that constant communication by letters has been kept up between them, I think that he might easily have arranged with his son to come to *Calais* and be examined last Winter or this Spring, so as to have his evidence in time for the trial instead of deferring the application for a commission until now, when, if granted, the trial must be again put off until January, 1869.

The summons must be discharged with costs.

E. J. HODGSON v. THOMAS DAWSON

June 6th, 1868.

Judge at Chambers no power to order *viva voce* examination of a witness *de bene esse.*

In this case the application is for a commission to examine *W. B. Dawson*, the defendant's son.

It appears that issue was only joined five days ago. The delay in joining issue may, for aught that appears, have arisen as much from the plaintiff as the defendant.

The defendant could not move for a commission till the cause was at issue, and has, therefore, been guilty of no delay. The order for a commission must, therefore, be absolute. But I decline ordering the examination to be viva voce, as I think I have no power to do so. Nor do I see that the case is one that requires a departure from the ordinary course.

HODGSON v. DAWSON.

Trinity Term, 1868.

Judge—what interest disqualifies him from trying a cause.

On Saturday the *Attorney General* intimated to me that an objection would be made to my trying this case, and I requested counsel to make the objection at once, so that I might have an opportunity of looking into the authorities, and considering the objection before the cause was called on.

It appears that besides this case there are several other cases against the defendant by different parties, and amongst them one by the *Bank of Prince Edward Island*, (but which does not stand for trial this term) in which I am a shareholder to the extent of six hundred pounds. It is alleged that the questions which will arise and the evidence which will be given in this case are similar to those which will arise in the case of the *Bank of Prince Edward Island*, and, therefore, I am incapacitated to try this case. I can have *no* interest (by which I mean valuable or pecuniary interest) in the result of this case as the claims of the *Bank of Prince Edward Island*

are not involved in it, and a verdict or judgment in this case can in no way affect its interests. A similar objection was taken by the defendant to certain jurors whose names had been returned by the Sheriff as special jurors, some of whom were shareholders, others directors, and one, the book-keeper of the *Bank of Prince Edward Island*. The application being, as I conceived, premature, I did not decide the point, but it appeared to me that officers and directors of the two banks (with whom the defendant's son who has absconded) had, as I understand it, large discount transactions, on which, or on some of which, it is sought by these suits to make old Mr. *Dawson*, the defendant, liable, would likely become so conversant with at least one side of the facts, perhaps, in some degree common to all the suits, that their minds might be prejudiced, and as there could be no difficulty (if their names were struck off) in supplying their places with unobjectionable persons I suggested to the plaintiff's Counsel that they should consent to the Sheriff's amending his list in this respect, intimating that, if on looking into the authorities, I felt myself authorized to do so, I should, on their being challenged, reject them. My suggestion was acceded to.

Now the objection to my trying this case is the same as that urged against jurors who were mere shareholders, viz., not that I am interested in the *result* of this suit, but that from similarity of the circumstances between the case in hand and that pending between the *Bank of Prince Edward Island* and the defendant, there will exist some bias or feeling in my mind which may influence my judgment against the defendant in this suit.

The general rule is, that a juror shall be indifferent, and if it appear *probable* that he is not so, this may be made the subject of challenge, as there is generally no difficulty in supplying the place of a juror so objected to by one who is unobjectionable, there can be no injury done in rejecting him. But the place of a Judge may not be so easily supplied, and his refusing to act in a particular case may be productive of great wrong and injury to suitors, and, therefore, I think that even assuming the objection to mere stockholders as jurors a good one, it would furnish no *test* of the validity of such an objection to a Judge. On a challenge to a juror for favor, his fellow jurors try whether he is indifferent, if they pronounce him so, he is competent. But who is to try whether a Judge is so?

It must be decided by himself, and when he knows that he has no feeling whatever, is he to declare that he has?

And here, I must observe, that in any case it is easy to say that in the opinion of a party the facts and questions in different cases will be similar, but it is difficult to see by what process of investigation the Judge is to satisfy himself that they are so. Here one side say that, in their opinion, the facts are the same, and that the questions will be the same; the other side say that in their opinion they will be materially different. The Judge must, therefore, adopt and act on the opinions of one side, or investigate the facts of each different case before deciding whether he will proceed with the trial. Besides, by what means can a person, a stranger to a suit about to be tried, be compelled to inform either of the parties to it what his evidence, or case, in a suit pending between him and either of them will be?

And unless the Judge knows what it will be, how can he compare it with the evidence intended to be given, or the questions to arise in the case about to be tried? The truth of the objection, that the facts and questions are the same, as well as the answer to it, must, therefore, in many cases, rest chiefly on opinion, the correctness of which cannot be satisfactorily tested, a strong argument in my mind against the validity of such an objection in any case. Objections to a Judge for interest in the *result of the suit* are not surrounded with any such difficulties.

But let us see what the authorities say on the subject. I have taken some pains to examine most of the old and modern cases which I could find in my Library. It is not necessary to review them, but I will refer to some which bear closely on the case in hand. The leading case is that of *Dimes v. the Grand Junction Canal Company*, reported 17 Jur. 73. It was an appeal to the House of Lords from the *Lord Chancellor of England*. It appeared that a suit in which the Company were plaintiffs was heard by the *Lord Chancellor* who was a shareholder in the Company to the extent of two thousand pounds. The appeal was heard by Lord *St. Leonard*, Lord *Brougham*, Lord *Campbell*, and eleven of the Judges of *England*. It was decided that such part of the *Lord Chancellor's* order as could only be made by the *Lord Chancellor* was valid, notwithstanding his being interested, but that those orders which might have been made by another Judge were

voidable. *Parke* B., who delivered the opinion of the eleven Judges, in alluding to the disqualifying interests of the *Lord Chancellor*, says "we think that the order of the *Lord Chancellor* is not void, but we are of opinion that *as he had such an interest which would have disqualified a witness under the old law he* was disqualified as a Judge." Then B. *Parke* puts the competency of the Judge as a witness under the old law as a *test* of his being disqualified as a Judge. What was such an interest as excluded a witness under the old law, is thus laid down in *Roscoe's Evidence*, 85.

"The general rule is, that no objection can be made to the competency of a witness unless he is directly interested in the event of the suit, or can avail himself of the verdict in the cause so as to give it in evidence on any future occasion in support of his own interest." Suppose I was called as a witness in this case, would my being a shareholder in the *Bank of Prince Edward Island* have been a valid objection to my competency as a witness under the old law? Certainly not, because I could neither gain nor lose by the verdict or avail myself of it on any future occasion to support my own interests. If this be (as laid down by the eleven Judges of *England*) *a correct test*, it is decisive of the present question. In *ex parte Medwin v. Hurst* 17, Jour. 1178, Lord *Campbell*, in pronouncing judgment, says. "the law is wisely jealous on this head. and the *slightest real* interest in the issue of a suit incapacitates any one from acting as a Judge in it, although it may be certain that, in fact, the interest from its real or proportionate insignificance, cannot create any bias in his mind, but then (he adds) *it must be a real* interest."

In every case I have met with where a Judge, justice of the peace, or person exercising judicial functions, was held disqualified, he had an interest in the *result of the suit*, and I can find no case where such an objection as this has been made.

In the *Parishes* of *Great Charte* and *Kennington*, Strange 1173, I find it laid down that where there are no other justices but those who are interested, they (though interested) may be allowed to act to prevent a failure of justice. And in a case in the Year Book 8 *Henry* 6—19, it was held that it was no objection to the jurisdiction of the Court of Common Pleas, that an action was brought against all the Judges of the Court of Common Pleas which could only be brought in that Court. Mr. *Thomson* mentioned two cases which occurred in *New*

Brunswick. In one, trustees for creditors were sued by a third party and a Bank (in which Judge *Wilmot's* brother-in-law was a shareholder) was a creditor, the verdict was set aside and no doubt correctly, for the Judge's brother-in-law, though not nominally, (as a shareholder) was, in reality, a defendant in the suit, and therefore, the Judge could not try from his affinity to the party; and another in which the late Chief Justice *Parker* refused to try an action about a boundary line because the prolongation of the same line would also form the boundary of his land situate at a considerable distance. But if, as it seems to me, the verdict in the case could not bind his right with the highest respect for the opinion of that eminent and very learned Judge, I think on that occasion he was in error.

The authorities, and the best consideration I can give it, lead me to the conclusion that the objections urged are not such as do disqualify a Judge, but, notwithstanding, if there were any other Judge, by whom the case could be tried, I should have gladly left it to him. But the *Chief Justice* and myself being the only Judges, he being the plaintiff's uncle, cannot try it, and my declining would prevent the case being tried at all, at least during the present term, I should, therefore, have felt myself bound to proceed with the trial, but having consulted the *Chief Justice* on this question and finding that he differs from me in opinion I must decline to do so.

SWABEY *v.* PALMER.

Hilary Term 1869.

Trespass for shooting dog—master liable for acts of servant done in course of employment—if from facts master's concurrence can be presumed trespass lies—in absence of such presumption case against master proper remedy.

This was an action of trespass against defendant for the shooting of plaintiff's dog by defendant's servant. It appeared that many of the defendant's sheep had been killed and worried by dogs. *Fitzpatrick*, the servant, who shot the dog, in his evidence stated that defendant told him to destroy all dogs that came on the premises without owners. The plaintiff also

put in a letter from defendant to plaintiff. The defendant called no evidence. There was nothing to shew that the dog was after sheep at the time, or was in the habit of worrying sheep. The defendant's counsel contended that *Fitzpatrick* had said that the orders were to destroy all dogs that came on the premises without owners to protect defendant's property.

I told the Jury that the dog not being in the act of worrying sheep, and not shewn to be in the habit of doing so, the shooting him was unjustifiable, and that whether the orders were simply to kill all dogs coming on the premises, or to kill them to protect defendant's property, as the result of the servant's obedience to the order, led to the destruction of the dog, and therefore, the defendant was liable. A Rule *Nisi* is moved for on the ground of misdirection. It was urged that the servant was only ordered to destroy all dogs that came on the premises to protect defendant's sheep, and as there was no necessity to destroy this dog for that purpose, the servant acted beyond his authority, and, therefore, the defendant was not liable.

The general rule is, that the master is liable for all acts of the servant done in the ordinary course of his employment, however wrong they may be, and however contrary to the intention or orders of his employer. The cases of *Simpson v. London General Omnibus Company*, 32 L. J. 34 cited in *Poulton v. London Railway Company* 12 B. L. Rep. 537, and the *Queen v. Stephens* 12 B. L. Rep. 702, afford strong illustrations of the inflexibility with which the rule is applied. In the first, the act for which the master was held liable was in direct violation of his orders, but was done in the course of the servant's employment. And in the second, the master was held liable to be indicted for a public nuisance caused by acts of his workmen in carrying on his works, though done by them without his knowledge, and contrary to his general orders. But the master's liability in an action of trespass does not rest on the *relqtionship* of master and servant, but on the fact that the act complained of was done by his command, which may be established by proof of a command to do the particular thing, or by a command to do something of a more general nature which comprises the trespass, or which, necessarily, leads to the act complained of, or by shewing that the act was done in the usual course of the servant's employment, where from the nature of the employment, *the command may be*

implied. Thus in *Martin v. Lyons* 8 Ad. & Ell. 512, Mr. *Smith* 146 remarks, that if the servant who had been used to distrain had merely distrained the cattle damage feasant the master would have been liable *in trespass*, but when he drove the cattle off the highway on to defendant's land, and then distrained, there could be no presumption of the master's concurrence. And in *Poulton v. London and Western Railway Company*, the company would have been liable *in trespass* for the act of the station master in arresting plaintiff if he had given him into custody for an act which the Company were authorized to arrest for, because however erroneously he acted, he would have acted in the course of his usual employment. The order was to destroy "all dogs coming on the premises without owners." This certainly would include any dog, and, consequently, this dog, when he came without an owner. But add the words, to protect his master's property, and construe them as confining the meaning of the order to such dogs as the servant should think it necessary to destroy to protect the sheep. This would amount to a general command to kill dogs coming without owners, with a delegated discretion as to the occasions on which he should act on it, and, therefore, in which ever way we take the order, the killing of this dog would be within it, in the first case directly, in the second, by the servant exercising the discretion conferred on him. For the evidence of *Fitzpatrick* was clear that he considered himself acting in obedience to his orders, nor did anything appear from which it could be inferred that he did it for any purpose of his own so as to bring the case within the rule of *McManus v. Cricket* 1 East 106. On this part of the case there is, therefore, no ground for a Rule.

But the plaintiff by putting in the defendant's letter made it evidence in the case, and the defendant has the same right to rely on anything favorable to himself contained in it as if it had been evidence proceeding from a mere witness in the case. It states that the orders to the servant were "to shoot every dog that came to the barns, unattended by any person, at night or early morning."

Now taking the order as so stated, I think the defendant would be liable. The business entrusted to the servant was to protect the sheep by killing dogs coming on the premises, and though, through carelessness, imprudence, or excess of zeal he killed them at an hour of the day the defendant did not intend,

and which might not be within the strict meaning of his orders, yet he was, evidently, acting in pursuit of the business entrusted to him. Suppose a master orders his servant to drive stray cattle off his land, and in doing so he maims or injures them with a pitchfork, or other improper instrument, it is laid down the master would be liable. *Reeves* Domestic Relations 517. Yet there the master never ordered or intended the servant to use improper instruments, or to injure the cattle. That is a stronger case than this.

But the dog was shot between 11 and 12 A. M. Then if the orders accorded with the letter, was the dog shot within the prescribed time? And if not, then a question (scarcely dwelt on at the trial) would arise, viz., whether the case does not fall within the rule laid down in *Morley v. Gainsford* 2 H. Bl. 442, cited *Smith* Na. & S. 149. *McManus v. Cricket* 1 East 106, *Shanod v. London North Western Railway Company*, 4 Exch. 580, and that class of cases where a servant acting in the business entrusted to him, and intending to obey orders, conducts himself so negligently, or indiscreetly as to cause injury to another, which, with ordinary prudence, or by strict conformance to orders, would not have occurred. The master [(though liable) from the absence of anything implying his concurrence in the injurious act] *is liable only in an action on the case.* If it does, then I should have directed the Jury that if they adopted the orders as stated in the letter and disbelieved *Fitzpatrick's* statement, that trespass would not lie, and to find for the defendant. On this point, therefore, I think the defendant is entitled to a Rule.

M'PHERSON *v.* RAMSAY.

January, 25th 1869

Description of Boundaries—words necessary to ascertain the premises cannot be rejected.

The deed describes the boundary of the premises as "commencing at a stake on the O'Leary Road about the distance of 30 chains from *Moreside's* North East Angle of land." The evidence shewed that the *locus in quo* was not (at the nearest point) within 90 chains of *Moreside's* N. E. Angle. The question is, can the words "from *Moreside's* N. E. Angle be

rejected as a false demonstratio. Secondly, can the site of land be entirely shifted from the locality described in a deed executed by the Sheriff under the authority of the land assessment Act. The following authorities seem to me very conclusive on the point. 1 *Greenleaf* Ev. S. 301 *Doe dem Hubbard* 14 Jur. 1112. There must be a good and certain description left, after shutting out the false demonstratio. In *Goodtitle v. Southern* 1 M. & S. 297, the question was as to parcel or no parcel, the site was not moved, and the description was complete, after rejecting the words which were inconsistent with the general description.

Doe d. Purdy v. Holton 4 Ad. & Ell. 78, the Court held, that, by the true construction of all the words of the description, the cottages passed, and that evidence to shew that the testator did not intend they should, was inadmissable. *Doe d Morton v. Webster* 12 Ad & Ell 442. Evidence to shew that the ground had been occupied with the house conveyed, and, therefore, in law passed under the word appurtenances, was admitted. But the *conditions of sale* and the *declarations* of the *grantee* were held inadmissable to shew that it was excepted, because that would contradict the deed. In 1 *Greenleaf* Ev. it is laid down, "evidence necessary to ascertain the premises must be retained, but words not necessary may be rejected, *if inconsistent with others.*"

Smith v. Galloway 5 B. & Ad. 48, had the words been "all that part now in the occupation of Smellbones and lying on N. W. side of the line," the occupation would have been a material part of the description, and the occupation could not have been rejected as a false demonstratio, per *Parke* (B.)

In this case *the point of commencement* mentioned in the description is a stake, thirty chains from *Moreside's* North East Angle of land. Is not that angle then a material part of the description? Reject it, and where are you to find a point of commencement for your lines? *Miller v. Travis* 8 Bing. 244. In *Hutchins v. Scott* 2 M. & W. 814, the point decided was, that an altered agreement might be given in evidence in an action for excessive distress, to shew the terms of the holding. It is true, Lord *Abinger* says "if 35 was the house intended I am clearly of opinion, parol evidence was admissable to shew that 38 was a mistake. But this a mere obiter dictum, not necessary to decide the case in hand, and it must be remembered that the defendant had only one house in Broad St. and, therefore, the

description "his house in Broad Street (No. 38) *after* 38 *was struck out*, would describe the only house he had in the Street with certainty. And Lord *Abinger* adds, "if there were any suggestion that the defendant had *any other house* the case might be different.

This is a land tax deed where the Sheriff selects any land on which the tax is not paid, or any part of a tract, where an owner of a large tract has left the tax on any part thereof unpaid. And it is, therefore, the same as if made by a man who had a dozen houses in one street. See also *Gascoine v. Barker* 3 Aik. 8, 3 Eq. C. L. 714, *Purdy v. Dodds* 1 Eq. C. L. Rep. 824. Although the case seems very clear it is a very important one. And if, after examining the authorities, to which I have referred, the Counsel thinks there is any ground for the Rule he can take it. But I entertain no doubt on the question.

At a subsequent day Mr. *Palmer* declined to take the Rule.

THE QUEEN *v.* DOWEY.

Hilary Term, 1869.

Grand Jury—no objection to Grand Juror that he was foreman of Cororner's Jury which returned verdict of murder against prisoner.

On Saturday the prisoner's Counsel moved for a new trial, or to arrest the Judgment on the same ground taken before the Jury were sworn, viz:, that *Mr. Weeks*, one of the Grand Jury who found the Bill, had, previously, acted as foreman of the Coroner's Jury which returned a verdict of murder against prisoner, the prisoner had objected to the indictment some time before the first application. But it was asserted and admitted by the Attorney General that the prisoner as not aware of the fact until after he had pleaded.

It is urged that *Weeks* having, by his verdict, expressed his opinion of the truth of the charge against the prisoner became incapacitated from afterwards acting as a Grand Juror on the Indictment founded on the same charge. It is urged that he stands in the same position as a Petit Juror who, having given a verdict on one trial, is challengeable if called as a Juror on

a second trial of the same cause, and of a Grand Juror who is incapacitated from serving as a Petit Juror on the trial of an Indictment found by the Jury of which he was a member.

It is unnecessary to refer to the numerous authorities cited to prove that a Petit Juror may be challenged for such causes, there being no doubt that he may. But the duties pertaining to the Grand and Petit Jury are materially different. The latter hears both sides, try, and finally decide on the guilt or innocence of the accused. The former only inquire whether the circumstances raise such a probability of the charge being true as ought to place the accused on his trial.

The coroner's inquisition was in effect an Indictment against the prisoner on which he could have been arraigned, tried, and convicted without any other Indictment being found. But the fear of its not being so correct in form as to sustain a conviction, the same charge under the name of an Indictment is preferred before the Grand Jury. It is every day's practice where an Indictment is supposed to be defective to send up a fresh one to the same Grand Jury. Now then the Grand Jury have previously found against the accused on the same charge, yet no one ever heard of an Indictment being quashed on that ground. That is substantially what *Weeks* did here, and I can see no reason why, if the Grand Jury had been composed of the identical persons who composed the coroner's Jury, they might not have found a fresh Indictment.

The finding of the Coroner's Jury is not, in its legal effect, a positive assertion that the prisoner is guilty of murder, but only that the evidence renders it so probable that he ought to be charged with it. In contemplation of law he is still innocent. But when a Petit Juror has found a verdict of Guilty it is a positive assertion that the party is so, and, therefore, he cannot act on a second trial of the same cause.

One reason for the Grand Juror being liable to challenge is, that he *may be one* of the twelve who found the Indictment and then if he sat on the trial a criminal would be convicted by only 23 instead of 24 of his peers. And the other reason is, that the Statute of 25, *Edw.* 3, enacts that no Indictor shall be put on the Inquest of the Indictee if he be challenged. These, I am convinced, (after a careful examination of the authorities) are the reasons why a Grand or Petit Juror in the cases, respectively, put is liable to challenge on a trial, and if so, it shews, I think, most conclusively that the authori-

ties cited relate to a different state of things, and, therefore, do not in any way support the present objection.

The paramount necessity for preserving the purity of the streams of Justice in every body concerned in its administration, whether his functions be proemial or decisive, will, of course, lead to the rejection from either body, of any one interested in promoting an accusation.

But supposing such an objection as the present lies to a Grand Juror it can only be on the ground of his having expressed an opinion, and taken as a challenge to the favor to be determined by triers. It is laid down if a *disqualified* person be returned on the Grand Jury he may be challenged by the prisoner before the Bill is presented, or if it be discovered *after the finding* the defendant may plead in avoidance and answer over to the felony, 1 Ch. C. L. 309. *Sir Wm. Withpole's* case, Cro. C. 134. But in the cases referred to the challenge was to the principal. It seems doubtful whether challenge *to the favor* can be so pleaded, or indeed made at all to a Grand Juror, (though the American decisions are that it may) but assuming that it could the prisoner here did not plead it, but pleaded not guilty only. Neither did he challenge before Indictment found, but he moved to quash the Indictment which, in *strict law*, he cannot do after plea pleaded, 1. 2, C. 10, yet, in furtherance of substantial justice, the Court will sustain an objection, though in strict law a prisoner may be too late in making it. But where the objection is merely technical, where the prisoner cannot be injured by the irregularity of which he complains, and it is, evidently, made merely in delay of Justice, the Court will not use its power to assist him. *Sir Wm. Withpole's* case Cro., C. 147, which was an indictment for murder, is a strong illustration of this principle. And the decision of Lord *Denman* in *Rex v. Sullivan*, 8 A. & Ell. 831, proceeded on the same ground. No one can suppose that *Weeks'* being on the Grand Jury was in the least degree prejudicial to the prisoner in this case.

But if the law had been otherwise, the Island Act 24 *Vic.*, C. 10, S. 34, is conclusive. It enacts that every objection to any Grand Jury panel, or individual Grand juror, or challenge to the array, shall be made before pleading to the Indictment, and not afterwards, unless it shall be made out to the satisfaction of the Court that the party was not aware of it at the time of pleading, in which case, if the Court shall consider

that such objection was material, and really and substantially affected the impartiality and justice of the proceeding, then, and in that case, *but not otherwise*, the Court, if it thinks fit, is thereby authorized to grant a new trial. As this objection did not affect the justice of the proceeding the application must be refused.

SENTENCE :—

That you, George Dowey, be taken from hence to the jail from which you came; and from thence you must be taken to Pownal Square, in Charlottetown, on Tuesday the 30th day of March next, between the hours of six o'clock in the morning and six o'clock in the afternoon, where you are to be hanged by the neck until you are dead, and may God Almighty have mercy on your soul.

BOUCHE v. AYLWARD.

Hilary Term, 1869.

Merchant Seaman Act 28 *Vic.*, c. 18, s. 22—though jurisdiction of Justices is confined to £50—where Justices to ascertain balance enquired into accounts exceeding £50, Court will not set aside Judgment.

The Judgment below must be sustained. The action is brought under the Merchant Seaman Act, 28 *Vic.*, c. 18, s. 22, which permits seamen to sue before two Justices for any amount of wages due to such seamen not exceeding £50 The plaintiff sued for £15 15s balance of wages, and in order to ascertain what balance was due it was essentially necessary for the Justices to inquire: First, the rate of wages; Secondly, the time he had served; Thirdly, what payments he had received. It is objected that the wages for the whole period of service amounted to £70, that sums for which the plaintiff gives credit as payment on account were not payments made to him by the plaintiff on that account, but were really sums appropriated by the defendant to his own use, and that the general account rendered by defendant to plaintiff shews that it was.

The Rule is, that where Justices must ascertain as an essential ingredient in the case whether a certain state of things exists, or whether a certain act was done or not, and

there is evidence respecting it which they take into consideration, their decision is final, though they come to an erroneous conclusion. The *Queen v. Bolton.* But where from the case it appears that they have acted without evidence, then the Court will control the exercise of their authority. The distinction is clearly shewn by *Rymer v. Justices of Middlesex* 7 Dow, Rep. 767, and *ex parte Vaughn* 22 B. L. Rep. 117, both cases decided under 59 *Geo.* 3, c. 12, s. 24, which gives jurisdiction to two Justices to turn out persons who had been permitted to occupy any tenement provided by the Parish for the habitation of the poor, or who shall unlawfully intrude himself into such tenement.

In the first case it appeared on the evidence that the house had been let by the Parish authorities to the defendant, and the Justices made an order to remove him. The Court reversed the order, because the evidence shewed that the party did not come within either of the descriptions mentioned in the Statute, but was an ordinary tenant. In the latter case, though the party, and those through whom he claimed, had 55 years' possession, and claimed to be owner in fee, yet, as the question for the decision of the Justices was whether the house fell within the class over which the Statute gave them Jurisdiction, title was an essential element in the inquiry, and although they had come to a conclusion not warranted by the evidence which they had considered, the Court had no power to review their decision.

IN THE MATTER OF ROBERT BELL,

AN INSOLVENT DEBTOR.

Easter Term, 1870.

Appeal from Insolvent Court—to sustain a charge of undue preference, the payment or transfer must be voluntary, i. e. originating with the debtor—if made in consequence of threat or pressure or in expectation of procuring further advances, it is ot voluntary.

This was an appeal from a Judgment of the Commissioner of the Insolvent Court refusing to grant the *order Nisi* for the Insolvent's discharge on the ground that a Bill of Sale given to one *McLean* of Halifax, a creditor, shortly before the act

of insolvency, was an undue preference. To make out a case of undue preference it must appear that the payment or transfer was voluntary, i. e. originating with the debtor, and made with the intent to prevent the equal distribution of his assets amongst his creditors. If it is made in consequence of threats or pressure by the creditor it is not voluntary, nor if it originated in a *bona fide* application by the creditor. *Doe dem Boydell v. Gilbert* 2 C. M. & R. 576, *Mogg v. Baker* 4 M. & W. 348. Neither will the fact of a conveyance being given in consideration of a pre-existing debt establish a charge of undue preference, if the expectation of time for payment and a further advance *bona fide* acted on the mind of the debtor. *Margarson v. Saxon* 1 Young Rep., cited *Starkie on Evidence* 1447; *Mercer v. Peterson* 2 & 3 Exch. L. Rep. 106.

The Insolvent positively swears that *Paul*, *McLean's* clerk, (who was sent here to examine his books and obtain security) threatened to arrest him if he did not give it. And in *McLean's* letter, sent by *Paul* to the Insolvent, as well as in his instructions to *Paul* when sent here a second time, "not to leave till he got the security," I think we have strong evidence (whether actual arrest was threatened or not) that pressure of a pretty decided character was brought to bear on the Insolvent. The Insolvent also states that *Paul* promised, or led him to expect that on his giving the security *McLean* would make him a further advance of goods, and also that no proceedings were to be taken on the Bill of Sale for six months, both which statements are to a considerable extent corroberated by *Paul* who says that but for the discovery (after the execution of the Bill of Sale) that some Bank Stock included in it stood in his daughter's name, he thinks *McLean* would have made him the advances. And if this was the understanding, *Bell* could not have anticipated that his shop was to be closed, and his goods seized and sold under the Bill of Sale 2 or 3 days afterwards, as that event would render further supplies useless. The learned Commissioner of the Insolvent Court appears to have taken the same view of the evidence on this point, for in his remarks on it he says, no doubt *Bell* expected a further advance would be made to him. Here then we have strong evidence of actual threat, or arrest, or pressure. Secondly, clear evidence of a very *decided* demand for security. Thirdly, an expectation raised in the debtor's mind of extension of time and further advances which would, naturally, and he swears

did, influence him to give the security. And lastly—save the fear of immediate proceedings and the expectation of further advances—an entire absence of any reasonable motive for giving *McLean* a preference over his other creditors.

I do not forget the expression attributed by *Paul* to the Insolvent, "that *McLean* had always acted as a father to him and deserved to be protected, and that the creditors here might look out for themselves." Precatory expressions of this kind used by men under such circumstances must be taken "*cum grano salis*," as they really reflect little light on their actual motives. The *filial* affection of the debtor is usually about on a par with the *paternal* regard of the creditor, both I fancy being regulated by the state of the ledger, or expected accommodation, rather than springing from the remembrance of benefits previously conferred.

The case seems an extremely plain one. There is no doubt that the Judgment of the Commissioner was erroneous and must be reversed with costs.

ORDER MADE BY THE COURT IN THE ABOVE CASE:—

To the Commissioner of the Insolvent Court of Prince Edward Island. Whereas, an Appeal from an order made by you in the said Court in the matter of Robert Bell refusing to grant an order *Nisi* for the discharge of the said *Robert Bell* from his debts, pursuant to an Act made and passed in the thirty first year of the reign of Her Majesty Queen Victoria, intituled "An Act for the relief of Unfortunate Debtors," hath been duly made and entered in this Court. And, Whereas, on hearing the said Appeal it appears to the said Court that the order so made by you, refusing to grant the said *Order Nisi*, was erroneous. It is ordered that the said order so made by you be set aside. And it is further ordered that with what speed you can, you proceed to grant the said *Order Nisi* to the said *Robert Bell*, according to the said Act, and that you do, after the said *Order Nisi* is granted, proceed thereon in such manner, according to law, as you shall see proper.

THE BANK OF P. E. I. v. M'GOWAN, SHERIFF.

Easter Term, 1870.

Escape—Limit Bond—Where prisoner has given a Limit Bond under 12 *Vic.*, cap. 1, s. 1, and escapes before Bail justify, Debt for, Escape does not lie against the Sheriff—Action must be under the Statute for a breach of the Bond.

This was an action of debt for an escape. The prisoner being arrested on execution and having given the usual limit bond was set at liberty by the Sheriff before justification and continued at large. The sureties never having justified as required by the 12 *Vic.*, c. 1, s. 1, two points are raised on the demurrer.

First. That the Statutes of Westminster 13 *Edw.* 1 c. 11 & 2 *Rich.* 1 c. 12, on which the action is founded are not in force in this Island.

Secondly. That the prisoner was lawfully at large under the authority of the Act, and, therefore, the only remedy against the Sheriff is for breach of the Bond before justification as pointed out by the Act.

As I am of opinion that the second objection is fatal to this action, it is unnecessary to give my opinion on the first. Though I do not desire to be understood as expressing a doubt that the action lies against the Sheriff on the *English* Statute.

It was urged by the plaintiff's Counsel that although the Sheriff may release the prisoner from custody before the sureties justify, yet, unless the justification be perfected within 14 days the Sheriff must retake him into custody, or be liable for an escape. But it is impossible to put such a construction on the Act. It provides that the sureties entering into the bond shall justify before the Judge or Commissioner, and that notice thereof shall be given by the prisoner to the plaintiff, or his Attorney, "*at least* fourteen days before the time of justification, or for such other period as the Judge or Commissioner in his discretion, may deem sufficient, not *exceeding fourteen days*." The direction to give at *least* fourteen days notice implies an option to give a longer notice. The discretion given the Judge or Commissioner to alter the length of notice is a provision in favor of the prisoner who might have his bail ready the day of the arrest, under it the Judge might (if he saw the plaintiff would not be injured thereby) allow the

bail to justify the next day, so as to prevent the prisoner needlessly remaining fourteen days in close confinement. The limitation restraining the Judge from extending it *beyond* the fourteen days (on which the plaintiff's Counsel based his argument) is also intended to protect the prisoner by preventing the plaintiff, under pretence of inquiring about responsibility of sureties, or for other causes obtaining an order to extend the period of justification, and, thereby, protect the prisoner's confinement. The permission to the Sheriff to set the prisoner at liberty immediately the bond is given is entirely unconnected with any particular period of justification. It, in effect, places the Sheriff in the shoes of the sureties until they justify by providing that "the Sheriff shall, nevertheless, be liable for any breach of the bond which may occur, unless the sureties shall duly justify as aforesaid." After justification the Sheriff's liability ceases and the plaintiff's remedy for escape is not *against* the *Sheriff*, but on the bond as assignee of the Sheriff. The liability of Sheriffs for escape of prisoners having liberty of the rules of the K. B. was referred to. There is some similarity in this respect that it is optional with the Marshal to grant liberty of the rules. or not, as it is with the Sheriff here to grant liberty of the limits before justification, but there all similarity ceases, for the Marshal only takes the bond for his own security; it is not assignable, and he is (in any event) liable to the action of debt for escape, if the prisoner go beyond the rules. Here the act *on justification* absolves the Sheriff from all liablity, and before justification only makes him liable for a breach of the bond, the second section expressly declaring that no Sheriff shall be liable to any action of escape &c, on account of any liberty granted to a prisoner on account of this Act. Here the Sheriff clearly set him at liberty under the authority of the Act, and, therefore, no action of escape, or any other action save that given by the Act can be maintained against him.

Judgment for the defendant.

M'INTYRE v. M'INTYRE.

Easter Term, 1870.

Award—When Award stated that both parties attended, and that arbitrators heard and considered allegations of both parties, Court will, on Demurrer, assume that facts justified award—if facts existed which would render award uncertain they should be pleaded.

An objection to an award on demurrer must appear on its face, or by facts stated in the plea; *Cargie v. Atkinson* 2 B. & C. 177. In this case the award alone is set forth. It is objected that it is not certain, inasmuch as it directs that the annuity of £15 shall be paid out of the claims of the plaintiff in the said property without shewing what *those claims are*, or on *what property* they attach. An arbitrator on a general submission of all matters, as in this case, need only make his award of such matters as were brought to his notice; *Watson* awards 195. Here the submission is general, and the award states "that the arbitrators have been attended by the parties and have heard and considered the allegations of the parties," so that we must suppose that those claims, whatever they were must have been discussed, considered and understood. In *Harris v. Creswick* 21 L. J. C. P. 399 (cited in *Jewell v. Christie* 2 C. P. L. Rep. 298) *Parke* B. says an award will be held final, if *by any intendment it can be made so.* In *Plummer v. Lee* 2 M. & W. 498, an award directing interest to be paid from date of last settlement was objected to for uncertainty, but held good on the principle "*id certum est quod certum reddi potest.*" In *Love v. Honeybourne* 4 Dow & Ry. 814, an award directing an executor to pay a sum found due out of assets in his hands as executor, was held certain as to the sum, and if it did not amount to a finding that he had assets (which the Court seemed to think it did) then he could plead *plene administravit.* And *Watson*, 209, lays down the rule that *everything* is to be intended in favor of an award, and the Courts will intend an award certain, unless it appears to be uncertain. In *Wharton v. King* 2 B. & Ad. 541, the Court say they must intend there was some contract which made *the defendant* liable to satisfy a Judgment given against *the plaintiff.* Here the award is that the *plaintiff* do lease the residence of the *defendant*, and it then goes on to direct that the defendant should pay the plaintiff £15, annually, during her life "*out*

of her claims on the said property," and not out of any part or portion of the said property to which the said plaintiff might be entitled in Law or Equity." It is clear, therefore, that her claims (whatever they were) were discussed and decided on, and as it appears that the plaintiff had heretofore resided with the defendant, it is not difficult to suppose that the plaintiff might have had some undivided life, or other interest in the property from which she was directed to remove, or, at all events, that she had some claim or interest in property under the defendant's control, which formed the subject matter of dispute, the nature of the claim and the identity of the property on which it attached being well understood by the parties. If it really was uncertain, the defendant should have stated the facts shewing it to be so in his plea.

It was argued that as the payments were to be made out of the plaintiff's claims on the property, the fund out of which the payments were to be made might become exhausted, or she might assign her rights, and that then the defendant would have to continue paying the annuity out of his own funds, but we must assume that the arbitrators knew the nature of her claims, and that there must have been some continuing interest attaching on property, or on the rents, issues, profits or dividends arising from it, which were under the defendant's control, and were not likely to become exhausted. And the award carefully guards against such a contingency by declaring that the payment is *not* to be made out of any part of the property to which the defendant might be entitled. If, therefore, from exhaustion of the property or funds out of which the payment was directed to be made, or in consequence of her assigning it, the defendant had no longer any control over them. A plea to that effect would bar her action, but on the present state of the proceedings I think the plaintiff is entitled to Judgment.

THE QUEEN, ON THE RELATION OF EDWARD HARDINGE, ESQUIRE, COMMANDER OF H. M. S. "VALOROUS,"

vs.

THE SCHOONER "S. G. MARSHALL."

IN THE VICE ADMIRALTY COURT of P. E. Island.

In this case the Schooner *S. G. Marshall* is seized for alleged breach of "the Merchant Shipping Act, 1854," and of the 59 *Geo.* 111. Cap. 38, for regulating the Fisheries under the Convention of 1818. The facts appearing on the depositions and evidence are these: *Ebenezer Marshall*, a citizen of the United States, came to this Island in the year 1854, and has since been engaged in carrying on the shore fishery on an extensive scale. About 1867, in consequence of losses, he became desirous of giving up the shore fishery, and taking to the deep sea or schooner fishery, and with that view built the schooner which is the subject of this action. He states that, knowing he could not get a British register in his own name in 1868, when the vessel was completed, he took his son, a boy of eight years old, to the Registrar's office, and at his instance the Registrar filled up the printed form of builder's certificate, stating *Ebenezer Marshall*, junior, to be the owner,—which certificate was signed by *Ebenezer Marshall*, the father, as builder. The usual declaration of ownership was also filled up by the Registrar with the name of *Ebenezer Marshall* junior, and signed by the boy making his mark. The Registrar states that he was told to put the name of *Ebenezer Marshall*, junior, on the register, and that he believed that to be his correct name. The boy's real name is *Ebenezer Heenan Marshall*, and he was born in this Island, and is therefore a British subject. *Marshall*, the father, states that, knowing as an American citizen he could not hold the register, before laying the keel he took legal advice, and was told that his son being a British subject, it could be held by him. That he built her for his son, that he might be enabled to educate his two boys, the registered owner and his brother, so that they might have

something if anything happened to him, but that he himself was to use her and take her earnings until the amount he had expended or become liable to pay for her building and outfit was reimbursed to him. It further appears that on the Twenty-first of last, the boy *Ebenezer Heenan Marshall*, junior, executed a mortgage to *I. C. Hall*, also an American citizen, for £550. Mr. *Hall* states that in 1868, he bought the mackerel caught from the schooner by *Marshall*, and also those caught in 1869. That these fish were packed by him and sent to the United States as British fish, and the duty paid on them; that the schooner has never been out of the gulf; that *Marshall* told him, when building her, she was to be put in the name of his son, stating that he had taken legal advice, and found it could be done. The vessel has always been navigated under the register so obtained. On the 31st July last she was boarded by Lieut. *Dent*, of H. M. S. *Valorous* She hoisted the British ensign. That on boarding he asked for the master, and *Ebenezer Marshall*, the father, came on deck and produced his papers. He asked for his clearance; he said he had none. He asked who was the owner: he replied, "this boy" (holding forth *Ebenezer Heenan Marshall.*) *Dent* said "a boy like that cannot be the owner; he is too young." *Marshall* added, "but I have an interest in her." He asked what countryman he (*Marshall*) was. He replied, he was a British subject. He returned on board and made his report, and was ordered to return and make further inquiries. Mr. *Nibblet* accompanied him. On that occasion *Marshall* stated that he was a *naturalized American citizen.* He then asked for his papers of naturalization. He said he had none, and then he said he was an alien. Some contradiction is given by some of the crew to the statement of Lieutenant *Dent*, as to *Marshall's* having at first stated that he was a British subject. Any person may misunderstand a conversation; but Lieutenant *Dent's* statement is confirmed by *Nibblet*; and as it was the particular duty of these two officers to take accurate notice of *Marshall's* replies, they are more likely to be correct than the crew who were standing by; and as one of them said a good deal of talking was going on, answers might have been given which they did not notice; but as the statement—whether made or not—will not have the least effect on the decision I am about to give, it is needless to give it further consideration. On Lieutenant *Dent's* returning, and making his second report,

he was ordered to seize her, which he did. The vessel, when seized, was 800 yards from the shore; Cape *Haldimand* bore South, three-quarters West; *McConnell's* point, West by North one quarter north. It is not disputed that the vessel had been fishing in that same place on the day previous.

On these facts, two questions arise for me to decide,—

1st. Whether this vessel was a British ship? and—

2nd. Whether she is not liable to forfeiture, having been navigated under a certificate of registry not legally granted, and using the British flag and assuming a British National character?

The register is only *prima facie* evidence of ownership, and it is clear that if it appears that a vessel registered in the name of a British subject is really owned by a foreigner, the register is only colorable, and the ship is still a foreign ship. The cases of the *King of the two Sicilies v. the Peninsula and Oriental Steam Packet Company*, (19 L. J. Equity, 210,) and the Princess *Charlotte's* case (*Brow* and *Lushington's* Admiralty cases, 78) place the law on this point in a clear light. In the first, a vessel built in England for the defendants was sold to *Grannatelli* and *Scalia*, two foreigners. In pursuance, as alleged, of a scheme formed by them and their legal advisers, and in fraud of the British Registry Act, and to defeat the plaintiff's claims, the ship, on completion, was registered in the name of the Company from which it had been purchased, and afterwards passed through several transferees who paid no consideration. The transfers were held to be made in fraud of the British Registry Act, and that the transferees were trustees for the foreigner, and the register void. In the latter, the Judgment of Dr. *Lushington* is as follows: "the question for me to decide is whether this vessel, at the time of the necessaries being furnished, was a British or a Foreign ship. The defendant relies on the British register. The plaintiffs say that the register was improperly obtained, and that the ship was really the property of the *Belgian* company. Now, it is proper to observe that provisions are made by the Legislature, in the second part of the Merchant Shipping Act, for the purpose of preventing ships which are the property of foreigners from being registered as British ships. Thus the 18th Section begins: "no ship shall be deemed to be a British ship unless she belongs wholly to owners of the following description, that is to say, etc." Unless, therefore, this ship belonged, at the

time in question, to owners falling within the limitation which follows in this Section, the register obtained is both false and fraudulent, and is no better than waste paper. It has frequently happened in my experience that both registers and ship's papers have been used for the purpose of claiming a particular national character for a ship. The principle upon which we always proceeded was to endeavor, by every description of legitimate evidence, to ascertain whether the ship was truly entitled to that national character, or whether it was a mere pretence, carried out by the adoption of a piece of bunting the vessel was not entitled to, and by papers which did not contain the truth. We never considered, in all cases I remember, that all question of the ship's nationality was set at rest merely because the papers and the bunting were *prima facie* evidence of national character.

"The register states the name, residence, and description of the owner, '*Arthur Smith*, of 16 *St. Mary Axe*, in the city of *London*, sixty four shares', and of these facts I accept it as *prima facie* proof. But if *prima facie* proof of that evidence, it is also of that which is stated on the other side of the register, of the fact that on the 14th October, 1857, this vessel was mortgaged for £55,000, and interest at 5 per cent. Now, if there was that mortgage for £55,000 it is the strongest evidence to me that the transfer was colorable; that the vessel was nominally transferred into the name of *Arthur Smith Owen* for the purpose of carrying out the charter, whilst the mortgage was taken for the purpose of controlling the power placed in his hands. All the other circumstances of the case, and especially the not calling of Mr. *Owen*, point to the same conclusion, and leave no doubt on my mind that the true owners of the ship were the *Belgian* Company."

Now, what is the evidence here? *Marshall* wishes to change his business from the shore to the schooner fishery; but as he could not own the schooner himself, he takes legal advice to see if she could not be registered in the name of his son. If he could have held her himself, can I believe he ever would have thought of this scheme? I cannot. His object, therefore, was to vest the legal title of the vessel, so that he could use her in the same way he would have done if he could have taken the legal ownership on himself. I attach no importance to his statement, that he did it to educate his boys. No doubt, like all parents, he was anxious to discharge his duty to them

in this respect; but he could have done this as well with a vessel in his own name as in his son's unless a vessel with the privilege of a British ship was necessary to accomplish his purpose. If so, the securing this privilege, not the educating of his boys, was his primary object, and the desire to educate only the cause for entertaining it. Besides, he was to apply the earnings of the schooner to educate the younger boy also. Then he reserves the right to take the funds necessary for that purpose for his own use, as the father, not the elder brother, is bound to educate the younger.

A great deal of evidence was offered to show that *Marshall*, at the time the schooner was building, declared to many persons that she was for his son. It is said these declarations are part of the *res gestæ*. So they are; but they do not make the impression on my mind they are intended to produce. Declarations accompanying acts may be faithful exponents of a man's intention, or they may be used as a cloak for very different designs. To be free from suspicion, they should appear to be naturally elicited. Here *Marshall* seems to be unusually assiduous in informing every one he comes in contact with that the vessel was building for his boy; and this just after he had received the advice, that the register in the boy's name would give her a legal nationality. It is highly probable that the advice was, that if he gave her absolutely to the boy, as a free gift, fettered with no conditions, and reserving no interest in himself, it would do so. This might account for his activity in informing others about his private business; and the declarations are equally consistent with the intention of an absolute gift or with an intention to manufacture evidence which might afterwards be useful in covering his real design; and therefore, although I draw no inference against him from these declarations, I can draw none in his favor from them. All these witnesses say they thought him sincere in making these declarations; and much importance seemed to be attached to their opinions. No doubt he was sincere enough, so far as registry in the boy's name was concerned, for he has done it; but for what purpose and for whose benefit the boy was to hold her, they had no means of judging. *Marshall's* own evidence furnishes a better clew to his intentions. He says he was to use her and retain the proceeds till she repaid him the expenses or liabilities he had incurred in her building and outfit. Is this consistent with an absolute gift? I think not.

But there is another very material piece of evidence. On the 12th July, 1870, the boy executes a mortgage to *Hall* for £550. It is true the mortgage is invalid; but the parties evidently thought it would have some effect or it would not have been made. Now, if the vessel belonged to the boy, what right had *Marshall* to make him give this mortgage? It must have been for *Marshall's* debt. It would be ludicrous to suppose that a boy not much more than half-way advanced to the age at which the law considers him to be *doli capaces* could give any assent to it or understand the transaction; and if *Marshall* (as the act implies) thought he had a right so to deal with her, it is very strong evidence indeed to show that *Marshall* felt he had a *right* to deal with her as the real owner.

But I must examine the effect of another circumstance in the case. The boy's true name is not put in the register. It is said that this is mere inadvertence. It may be so; but in a case like this, I am bound to examine accurately into each act done, and the effect it may produce. Now, suppose the boy demanded the schooner, and *Marshall* refused to give her up, and he brings an action to recover her; he must sue as *Ebenezar Heenan Marshall*. But that not being the name in the register, the register gives him no title to recover. A Court of Equity might give relief; but the incorrect name would interpose difficulties to the boy's recovery which, under the correct name, would not have existed. Again, the facilities for transferring her to an innocent purchaser, given by the introduction of "*E. Marshall*, junior," in the register, might interpose obstacles to the assertion of the boy's right of a much more serious description. I am unwilling to attribute improper motives to parties; but I cannot shut my eyes to the consequences which might flow from the alleged inadvertence. Upon the whole evidence, it is impossible to come to any other conclusion than that the register to the boy was merely colorable, for the purpose of giving the vessel a British character, whilst *Ebenezer Marshall* always has been and is the real owner.

The fact of *Marshall's* domicile in this Island is inserted in his answer, and—in connection with another defence to which I will presently allude—was a good deal pressed on my attention; and the case of the *Johanna Emelia* (29 Law & Eng. Rep. 565) was cited, in which Dr. *Lushington* says: "Mr. *Rucher* was Hanoverian, residing at Riga. He was domi-

ciled there for many years, and must, therefore, *in consequence of his domicile*, in all that relates to his national character, be taken to be a Russian, not a Hanoverian." But that was a case of capture of a supposed enemy's vessel during the Russian war. The object of such captures, during war, is to cripple the enemy's trade, and as, *for the purposes of trade*, every man is considered to belong to the country in which he is resident, his domicile in such cases is all that needs to be inquired into; and that being proved to be in an enemy's country, the right to judgment of condemnation against the vessel is established. But that rule can have no application to a case where (in a state of peace) an alien claims a right to *own* property which none but British subjects are permitted to *own*. In such case naturalization in the legal way (not domicile) can alone give him that right. But the defendants set up as a defence that, although *Marshall* is an American citizen, his father was Scotch and his mother Irish, and he is, therefore, under the statute of *Anne*, a natural-born British subject, and therefore that the vessel is not liable to forfeiture on account of his *ownership*; and this would be, doubtless, a good defence, according to *Wall's* case, even though his father had taken the United States oath of allegiance. The evidence to support this defence rests entirely on his own testimony that such is the case. The statute makes the party a competent witness; but the weight of the evidence rests with the Judge, who has to consider it; and my experience has led me in cases like this, where the temptation to state what is untrue is great, and the means of detection and contradiction are difficult to be obtained, to assign no appreciable weight to such testimony. I would, therefore, on this evidence, decide against the defendant's plea of British origin. His counsel, however, urged that further time should be allowed him to procure further evidence in support of it; and considering that the vessel has been very recently seized, and that the natural desire of the defendant to get a release before the fishing season has passed, might induce him to risk a trial on weaker evidence than he might otherwise have produced, I should have acceded to their application if the decision I have come to on the second point had not rendered that defence unavailing; and therefore I do not mean to found my judgment on the first point. On the second point, the vessel is clearly liable to condemnation. The 52d sec. of the Merchant Seaman's Act provides that "if the master or owner of any

ship uses or attempts to use, *for the navigation of such ship*, a certificate of registry not *legally granted* in respect of such ship, he shall be guilty of a misdemeanor, and it shall be lawful for any commissioned officer on full pay in the military or naval service of Her Majesty, or any British officer of Customs, or any British Consular Officer, to seize and detain such ship, and to bring her for adjudication before the High Court of Admiralty in England or Ireland, or any Court having Admiralty jurisdiction in Her Majesty's dominions," and the effect of the 19th, 106th, and 103d Sections is to render any ship not entitled to the character of a British ship, whether owned by qualified or unqualified persons, liable to forfeiture if she flies the British flag or assumes the British national character.

That the register. in this case, is not legally granted, cannot be and is not denied by the defendant's counsel, as it was granted to an infant, who could not make the declaration; but it is urged that the 52d Sec. does not apply to this case, the Registrar himself having done wrong in taking the infant's declaration, and that the error in the name arose from mere inadvertency.

The second part of the Merchant Shipping Act is very stringent with respect to all that concerns the registry, and necessarily so, to prevent frauds, and to preserve its integrity. The provision of the 40th Sec. is as follows: "Upon the first registry of a ship there shall, in addition to the declaration of ownership, be produced the following evidence, that is to say, First, in the case of a British-built ship, a certificate (which the builder is required to give) containing a true account of the proper denomination and tonnage of the ship and time when and place where she was built, together with the name of the party on whose account he built the same. Sect. 44 provides that on the completion of the registry, the Registrar shall grant a certificate, in the form marked D., containing the following particulars (that is to say), 5th, the name and description of the registered owner or owners. The 43d Sect. provides that, subject to any rights appearing on the registry books to be vested in any other party, the registered owner of any ship, or share therein, shall have absolute power to dispose, in manner hereinafter mentioned, of such ship, and to give effectual receipts for any moneys or money advanced by way of consideration.

The great power given to the registered owner shows the importance of his name being correctly stated. If it is not, he cannot transfer; but if a certificate gets out of his hands, others with names identical with that in the register easily may. Deeds are often held good, though there be a mistake in the name; but then it is a matter of contract, and there may be something descriptive to correct the error; and there is no stringent statute operating on the transaction to prevent it. In *Sheppard's* Touchstone, 236, it is laid down: "but where the grant doth intend to describe the person of a party by his proper name, and doth omit or mistake his christian name, in this case, for the most part, the grant is void, unless there be some special matter to help it." But no evidence could, I think, be permitted to explain or add to the register. *McLaughlan*, after commenting on the register and its requisites, says, p. 75, "the integrity of the register being of the utmost importance to society, it is of equal moment that the keeper of it should use caution and refuse to make an entry, save upon such evidence only as, being within the requirements of the Act, would satisfy a Court of Justice." And again, at page 80, he says: "the function of the register is to be authentic evidence to Her Majesty's officers, and afford a ready means of information, in any quarter of the globe as to *who* are some of the *responsible persons* when penalties have been incurred in connection with the ship."

It was urged that this was in the nature of a criminal proceeding, and that if the name was given *bona fide*, though the register is not legal, the party would not be guilty of a misdemeanor, and, for the same reason, the vessel should not be condemned; but if he were tried for the misdemeanor, the jury must find it was a mistake before they could acquit him though the wrong name may not have been intentionally given, I certainly cannot say that it was not, and it must be observed, that if the boy had been legitimate, *cui bono*, would not have been so strong, for then the father's parental guardianship would have given him entire control of the property; but as the son was born before marriage the law would not recognize him as guardian. *Marshall* would, therefore, have no control over this property, and the boy might, at any time, bring an action and recover the vessel, while, in case the boy died, not being of kin, *Marshall* could have no claim to her whatever, and could never get her back. He therefore ran a tremendous

risk in registering the boy as owner, against which he would be naturally anxious to provide some chance of escape; and it might readily occur to him that similarity of name in such an event would prove a friend in need. That an act done inadvertently should so exactly tally with his interest, is at least a remarkable coincidence; and it must be observed, that the offence which causes forfeiture of the vessel is the using a register not legally granted,—not the illegality of procuring it, —and the defendant was aware of all the facts relating to it. The discretion of the Judge is directed to ascertain whether the evidence sustains the charge. The use of the register being clearly proved, and its illegality so patent that it cannot be denied, my duty is plain. If penal statutes, in particular cases, press too hard. the Crown has the power of mitigating their severity. The Judge has none.

As to the argument, that the registering officer is to blame, the answer is, that the person who seeks the register has to make a legal declaration, and give a true description of himself. The registering officer, in this case, displayed gross ignorance of his duty, and most culpable negligence, and his conduct, in taking the declaration of this little boy, is most reprehensible. That does not excuse the defendant, *Ebenezer Marshall*, who was bound to know that a boy could not make the declaration, and who could have given the correct name. In *Mann's* case, 3 E. Appeal cases, 456, where a shareholder in a Company transferred shares to an infant, a similar point arose. Sir *John Rolt*, L. J., said: "it is, however, contended that there is a duty thrown upon the directors to inquire whether the proposed transferee is a proper and competent person to be a transferee, —not merely that they had the power to eject an improper person, but that it was their duty to do so, and that they neglected this duty, and that the Company are, consequently, estopped from saying this transfer was a nullity. I think this argument cannot be sustained, and the answer to the following question shows that it is so: 'was there any greater or prior duty cast upon the Company of inquiring whether *Mann's* transferee was a proper person than upon *Mann*, the transferor himself, of so doing?' Both *Mann* and the Company took it, as a matter of course that the transferee was a proper person. The nomination by *Parkinson* of *Symes*, as the transferee amounted to a declaration that *Symes* was a proper person. Surely the first duty of ascertaining that his transferee was a

proper person was cast upon *Mann* himself. Therefore I think that *Mann* still remained a shareholder." The principle on which this case was decided is so applicable to this question, that I think it decisive on this point.

With respect to the charge of flying the British flag and assuming a British national character, the latter part of the first clause of the 103d sec. enacts: "that in any proceeding for enforcing forfeiture, the burthen of proving a title to use the British flag and assume the British national character shall be upon the person using the same." What title have the defendants shown to use that flag? They produce, as their authority for doing so, a piece of paper purporting to be a register, but which, from facts within the knowledge of the real defendant, was worth no more than a piece of waste paper.

There is one circumstance to which I ought to allude. Captain *Marshall* complained that, after arriving in port restraint was put on his person, and his communication with the shore interdicted by Captain *Hardinge*; and as the charge was made in giving his evidence, I permitted Captain *Hardinge* to be called to explain it. He stated that he arrived in port late in the evening; that he communicated with the Administrator the next day, and was told not to detain him; that his impression until then was, that he should be detained. And in my opinion, before communicating with the Administrator he would have erred in discharging him. Under the statute Capt. *Marshall* was liable to be prosecuted for misdemeanor; and if the Government intended to prosecute, might have detained him till he entered into recognizance for his appearance; or, if his evidence was deemed material respecting the seizure, to enter into recognizance to appear as a witness. The officer in charge of the schooner states, that early the next morning, he informed Capt. *Marshall* he had orders to discharge him, and that a boat was ready for him when he wished; that he remained, of his own accord, (getting his things together as he believes,) an hour or two after that, and when ready, was landed. This officer also states, that he informed Capt. *Marshall* that if he wished to communicate with his friends on shore, he had orders to let him do so through the *Valorous*. Captain *Hardinge* was certainly not bound to allow direct communication with the shore and the schooner and he appears only to have followed the rule of the service in respect to such cases.

I have gone through the evidence and stated my reasons for the conclusions I have arrived at on the various points at considerable length, in order that the parties might understand the grounds of the decision, and also find their proceedings facilitated should they desire to test its correctness in a higher Court. But in consequence of the opinion I have expressed, that the defendant should (if the case rested on the first point) have further time to procure evidence to support his plea of British origin, the Judgment will rest wholly on the charges of navigating under a register illegally issued, and flying the British flag, and falsely assuming the British national character. And it is therefore proper, before giving Judgment of Condemnation, to give the Attorney General the option of taking the Judgment on these grounds, or of waiting the result of further evidence on the other charge.

The Attorney General having elected to take Judgment, the Court proceeded to pronounce Judgment of Condemnation against the vessel, her apparel, furniture, etc.

HALL & MARSHALL *v.* YATES.

Easter Term, 1871.

Merchant Shipping Act—when finding vessel is seized and condemned under 52 section of Merchant Shipping Act, seines and implements put on board for fishing purposes also forfeited.

This was an action brought against the defendant, who is Marshal of the Vice Admiralty Court. In July last the schooner "*S. G. Marshall*" was seized by *Capt. Hardinge* Commander of H. M. S. *Valorous*, appointed to protect the fisheries, and prosecuted in the Vice Admiralty Court for alleged breach of the *Merchant Shipping Act*, and also the Act 59, *Geo.* 3, c. 38, for regulating the fisheries under the convention of 1818. For reasons stated in the Judgment, given in the Vice Admiralty Court, the condemnation was confined to the charges under the *Merchant Shipping Act*, viz, "for using for navigation of the vessel, a register not legally granted, and for flying the *British* flag and assuming the *British* national character," and under these latter charges Judgment of forfeiture was pronounced against the vessel, her tackle, apparel, and furniture. It appears that when the

vessel was seized she had on board the following articles, viz:

1 Seine Net	value	£423	11	6
194 Barrels	"	43	13	0
½ do	"	7	19	3
Salt	"	27	18	0
14 Barrels Bait	"	21	0	0
1 Bait Mill	"	4	10	0
Dip Nets	"	3	0	0
Boat for use of Seine	"	30	0	0

No mention was made of these articles before the Vice Admiralty Court, nor any Judgment given against them, specifically, but they were sold by the defendant under the general order for sale of the vessel, her tackle, apparel and furniture.

From the evidence it appeared that the Seine, when employed in catching fish, is sent out in boats from the vessel and drawn in the sea, sometimes at a considerable distance from the vessel, but the captured fish are put in the vessel. Mr. *Hall's* testimony on this point is as follows, "the Seine is used in fishing with two boats, it is drawn round the fish and then pulled up. It cannot be used from the vessel. We put it on board the vessel to transport it to the fishing ground, but when in use it is towed in a large boat behind the vessel from place to place. We usually have a Seine master to take charge of it; he belongs to the vessel and sleeps on board when at sea. It is used from the shore or at sea. Several vessels sometimes have one Seine. I have known a British vessel and an American vessel use one Seine The Seine boat is not for the use of the vessel, but it goes with the Seine. If a vessel goes on a fishing voyage the Seine and boat are taken to catch fish." The Seine was in the vessel at the time of the seizure and there was no pretence of an intended joint user of it with any other vessel. It also appeared that vessels engaged in this fishery generally fish with hook and line, and that Seines are used (only to a very limited extent) in addition to the hook and line usually employed. Mr. *Dean*, a witness long engaged in the fisheries, stated that out of 600 or 700 vessels employed last year in this business, he only knew of three that had Seines. The question raised on these facts is, whether all or any of the articles mentioned are tackle, apparel or furniture, liable to forfeiture under the Act, and the verdict is to stand, be reduced, or entered for the defendant according to

the opinion of the Court. *Parsons*, in his book on Contracts, Vol. 2. p. 273, says, "by the phrase 'a ship with all her appurtenances,' or 'with her apparel,' or 'furniture,' or any equivalent phrase, and even as we should say by the word Ship alone (or Barque, Brig, Schooner &c,) whatever is then *on board of*, or attached to her, to adapt her for the voyage or adventure in which she is engaged, passes as a part of the ship to him who buys her. There have been many adjudications on this question and it might sometimes be affected by usage, but generally the rule is not capable of a more precise definition."

In *Gale v. Laurie*, 5 B. & C. 160, which was an action for damages against a vessel called the "*Dundee*," a *Greenland* whaler, for running down the plaintiff's ship. The defendant contended that under 53 *Geo.* 3, his liability was limited to the value of the ship, and that he was not liable in respect of stores not required for her navigation, but only for the objects of the voyage. The special verdict found that the fishing stores belonging to *Greenland* whalers consisted of harpoons, lances, boats, and various other things for the purpose of catching whales and other fish, and casks for containing and bringing home the blubber, oil, &c, and that according to the usage of trade such things would not be covered by a Policy on the ship, her tackle, apparel, and furniture, and that the *Dundee's* stores were of the value of £2,223. *Abbot*, Ch. J., says, "the fishing stores were not carried on board the ship as merchandise but for the accomplishment of the objects of the voyage, and we think that whatever is on board a ship for the object of the voyage and adventure on which she is engaged, belonging to the owners, constitute a part of the ship and her appurtenances, within the meaning of this Act."

"This construction furnishes a plain and intelligible general rule, whereas if it should be held that nothing is to be considered as part of a ship that is not necessary for her navigation or motion on the water, a door would be opened to many nice questions and much discussion and cavil."

These authorities seem to establish the proposition that whatever is on board a vessel, or attached to her, to adapt her for the voyage on which she is engaged, is deemed, in law, as part of her tackle, apparel and furniture. It is not contended that the provisions, hooks and lines (with which only such vessels are usually fitted out) are not comprized in the condemnation, but it is argued that as the Seine was an article not

generally used by vessels engaged in such fisheries, and not intended to be used (like hooks and lines) from her, it cannot be considered part of the vessel, her tackle, apparel or furniture. I confess I was much impressed on the argument with Mr. *McLeod's* reasoning on this point, but on the best consideration I have been able to give it, I am satisfied that these circumstances do not withdraw it from the general rule applicable to other fishing stores. It may be quite true that such vessels do not usually carry Seines, but the question under this Act of Parliament is not whether such things are *generally used*, but whether this Seine was carried on board this vessel for the purposes of enabling those on board to capture fish, that being the object of the voyage. The evidence of Mr. *Hall* shews that all the crew shared in the fish taken with it, as well as those taken with the hook. He says, "when we send a Seine with a half line vessel the Seine and boat draw a share, sometimes a fifth, sometimes an eighth, according to agreement. In some cases each man pays so much for the use of the Seine and boat, but this depends on the agreement." In this case the Seine was intended to be used to carry out the object of the voyage, it seems to come within the very words of the rule laid down by *Abbot* in *Gale v. Laurie*. But it is said that the word "appurtenances" has a more extensive meaning than furniture, a remark which fell from Lord *Stowell* in the case of the *Dundee*, but on the same facts in the King's Bench, *Abbot*, C. J., seems to have thought there was little difference between them. He says, "the first section on which the question arises is to be understood as if the words 'with all her appurtenances were used, *supposing those words would have made any difference.*'" But asuming the word appurtenances to be more comprehensive than furniture, is not the latter word sufficiently comprehensive to include this Seine and other outfits placed on board for the purpose of the voyage? *Webster's* explanation of its meaning is, "that which furnishes or with which anything is furnished or supplied, fitting out, supply of necessary, *convenient*, or ornamental articles for any business or residence." The plaintiff, *Hall*, states that he and *Marshall* fitted out the vessel, and that they were joint owners of the Seine and all other outfits, and the Seine (though not absolutely necessary) was, evidently, put on board as a *convenient* means of more successfully prosecuting the objects of the voyage. The kind or number of appliances used to carry out any

enterprise, often very much depends on the pecuniary ability of those engaged in it. But the novel or more numerous outfits of a wealthy owner are not the less outfits because many with less means are content to carry on similar operations with fewer or more simple appliances. Comparatively few ships carry chronometers, yet in *Langton v. Horton* 6 Jur. 911, a Bill of Sale of a ship with her tackle and appurtenances, was held to pass a chronometer not specifically mentioned. It is true, in *Richardson v. Clark* 15 *Mass* Rep., Judge *Emery* decided that a chronometer, under simi'ar circumstances, did not pass, but the *English* decisions are those which we regard as authorities, and they seem most consistent with the general doctrine laid down in the *American* text books. Neither do I think that the circumstance of the Seine being used, not from the vessel, but from boats, alters the case. In *Gale v. Laurie* the harpoons, lines, and other appliances for taking fish were to be used in a similar manner. Again, it is said that as the Seine was really owned by the plaintiff, *Hall*, who was not the owner of the vessel, it is not liable to forfeiture, the intention of the Act being (it is argued) to limit the forfeiture to outfits belonging to the owner of the vessel, or to things attached to her, or necessary for her navigation, and the hardship of a contrary construction on an innocent person who has put his property on board for a particular enterprise was strongly insisted on. The 52 sec. of the *Merchant's Shipping Act* enacts that if the master or owner of any ship attempts to use, for the navigation of such ship, a certificate of Registry not legally granted in respect of such ship, he shall be guilty of a misdemeanor " and any commissioned officer in the naval or military service of Her Majesty may seize her and bring her for adjudication before any Court of Vice Admiralty, and if such Court is of opinion that such use or attempt at use has taken place, it shall pronounce such ship,with her tackle,apparel and furniture, to be forfeited to Her Majesty." The Legislature must have been well aware of the general rule respecting stores, and there is nothing in this clause which shews any intention to except tackle or furniture which has been lent or hired to the owner of the vessel, or which belongs to a person who (as in this case) has made himself a partner with the owner in the voyage and adventure, from the general words which in themselves comprise everything which constitutes the tackle, apparel and furniture on board at the time of

seizure. Where exceptions from forfeiture are intended the Act seems carefully to provide for them. Thus the acquirement of an interest by an unqualified person forfeits his share, but the Act expressely excepts cases of shares transmitted by death, bankruptcy &c. The interests of innocent owners are, in many cases, affected by the delinquency of others. Thus flying the *British* flag, or assuming the *British* national character on board a ship owned in *part* by a disqualified person forfeits the shares not only of the disqualified person, *but of those also who are qualified.* Mr. *McLaughlin*, in commenting on these sections says, "and in proceedings to have the forfeiture declared the *onus* of proving title to such use and assumption is cast on the person making it. This is a forfeiture which may involve the property of *British* subjects who are therefore bound by regard to their own interests to see that no part owner of the same ship with themselves is a person disqualified to own a *British* ship." This seems quite as severe against qualified owners as the forfeiture of fishing stores and implements owned by one who is only a partner in the adventure upon a particular voyage. The Act seems to leave the one to watch against the contamination of disqualified ownership, and the other to ascertain by his own vigilance that the vessel he fits out is entitled to the character she assumes. It is true, in *Gale v. Laurie*, *Abbott* says whatever is on board for the purpose of the voyage "*belonging to the owner*," but he says so because by the express words of 52 *Geo.* 3, c. 1, s. 9, on which the question arose, the owner's liability was restricted to the value of his *own goods.* So on a policy or bill of sale the interest of the insured, or right of the vendor limits the underwriter's liability or the vendee's right But that does not affect the abstract rule laid down for ascertaining what constitutes the furniture or appurtenances of a vessel at any particular period.

It is urged that this is a penal Statute and must be construed strictly. The Statute is, no doubt, pregnant with penalties and forfeitures, but it is a Statute made for regulating and protecting interests of the highest importance to a great maritime nation, and while we take care not to draw cases within its penal clauses by implication, we must be careful not to exclude those which, under the ordinary meaning of the words used, come within them. The rule so generally quoted, that penal Statutes are to be construed strictly, does not authorize the

Judges to make the law what they think reasonable in particular cases, it only means that where the intention of the Legislature is doubtful that construction which absolves from forfeiture shall be adopted. But, as remarked by *Broom*, in his Legal Maxims, "the rule must not be so applied as to narrow the words of a Statute to the exclusion of cases which those words, in their ordinary acceptance, would comprehend." The observance of fiscal laws, which there is strong temptation to evade, is enforced by forfeitures which often affect the property and rights of innocent persons. In such cases Lord *Stowell* observes 2 Dod. Admir. C. c. 271, "it is sufficient if there be a contravention of the laws *a fraus in legem* whether that may have arisen from mistaken apprehension, from carelessness, or from any other cause, it is not material to enquire." That innocence of intention or mistake is also no answer to forfeitures incurred for the breach of laws for preserving the nationality of shipping is strongly shewn by the cases of the "*Venus*" and of the *United States v.* the "*Bartlett Davies*," 2 *Parsons*, Mar. Law 38, determined in the Courts of the *United States*. In the first, "of two partners in a commercial house doing business in *New York*, one, *Lenox*, resided in *New York*, the other, *Maitland*, was a resident merchant of *Great Britain*. To obtain a register, *Lenox* made oath in *New York* that he, together with *Maitland*, of *New York*, were the only owners. At the time, *Maitland* was domiciled in *Great Britain*. The Court held that the vessel was subject to forfeiture, *although the oath was taken innocently and in ignorance of the character* imparted to *Maitland* by his residence in *England*."

In the latter (the *Bartlett Davies*) it was found that *enrolments in a certain custom house were occasionally made as a matter of convenience on the oath of the master only*, but on a case coming before the District Court of *Maine* it was held that such an enrolment was wholly void and could not confer upon the vessel the rights and privileges of a vessel of the *United States*.

It was argued that the forfeiture of articles *owned by third persons* must be confined to things necessary for navigation. But why stop there? If, notwithstanding, the rule that whatever is on board a ship to adapt her for the purpose of the voyage is part of the ship, her tackle, apparel, or furniture, and the express words of the Statute, "that the ship, her tackle, apparel and furniture shall be forfeited," some articles

owned by third persons are to be exempted, why should not anchors, sails, &c, be equally exempt? It seems to me, before you can draw a line between property of third persons put on board for one purpose of the voyage and that put on board for another purpose you must shew some authority in the Statute (similar to that in 53 *Geo.* 3) authorizing you to draw such a line, and if you cannot, you must accept the application of the express words of the Statute to the rule with all its resulting consequences, and that either all property of third persons put on board is exempt, or none is so.

From the peculiar hardships of this case as regards Mr. *Hall*, I must confess I set myself to consider it with a strong desire to come to a different determination, but the authorities are, in my opinion, too conclusive to admit of any other result than that I have arrived at.

I have not thought it necessary to advert to the numerous cases cited on the argument as to the effect of the words, furniture, appurtenances, &c, in policies of insurance and bills of sale, because I think the general rule which makes these words comprehend all stores intended for the purposes of the voyage, well established, and that usage or custom is admitted in those cases, not as denying the rule, but on the ground of an implied conventional limitation of it to a smaller class of things than those words in their ordinary meaning would comprehend, and, therefore, those cases cannot apply to the construction of a Statute where no such limitation is expressed or implied.

I think the verdict should be entered for the defendant.

NOTE. The Chief Justice concurred in the above Judgment, but Mr. Justice Hensley dissented.

DOE DEM M'DONELL *v.* M'ISAAC.

Easter Term, 1871.

Perpetuity—Determinable Fee — Trustees' Estate — where with respect to the two first trusts, the trustees' estate would only be commensurate with the trusts, but the other trust required the fee—held that the latter trust being void the trustees' estate determined on the expiration of the first trusts.

This was an action of Ejectment. The lessor of the plaintiff claims under the will of his maternal grandfather, Captain

John McDonald. In 1810, the testator made his will, (which though a very prolix document) in effect devises the Estate of *Donaldston* of which the *locus in quo* is part to *William* and *Alexander McDonald* (persons resident in *Scotland,*) and their heirs and assigns in trust to permit his daughter, *Flora McDonald*—the lessor of the plaintiff's mother—to enter into possession and have the exclusive and sole management of the property and thenceforth during her life to receive and take the rents and profits for her separate use free from the control of any husband she might marry, and after her death, that the said trustees should permit and suffer the rents and profits of Estate of *Donaldston*, and every part thereof to be employed and laid out by the guardians appointed by her (or failing of such being appointed by her) by her brothers or the majority of them, in case of difference, residing on this Island, in bringing up and placing out to employment the eldest and the younger children of his said daughter, of her first marriage, even though she should have been oftener married, and that until the eldest son of her first marriage should have arrived at the age of 30 years, complete, and then when the eldest or the next surviving eldest son of her first marriage shall have arrived at the age of 30 years in trust, that the said *William* and *Alexander McDonald* and their heirs shall convey in fee, by a valid deed, the said Estate of *Donaldston* to such eldest or next surviving son and his heirs male.

The testator died in———The lessor of the plaintiff's mother married the plaintiff's father in 1821, and she and her husband continued in possession until 1854, when he died, and the widow continued in possession until 1864, when she died intestate. The lessor of the plaintiff is the eldest son of the marriage, and attained the age of 30 years, long before the commencement of this suit. No conveyance of the Estate has been made to the lessor of the plaintiff by the trustees, nor, in fact, did his mother or he ever hear from them, nor have they in any way ever interfered with the Estate.

For the defendant, it was contended that the legal Estate was in the trustees, and no demise being laid in their name the plaintiff must be non-suited.

The plaintiff argues that the trustees took no Estate under the devise, or that if they took anything, it was only an Estate in fee during the life of *Flora McDonald.*

The first question, therefore, is, what Estate did the trustees

take? The limitation of the Estate is not to the *use of the trustees*, their heirs and assigns, which would give them the fee on the ground that a use cannot be limited upon a use, *Doe dem Booth v. Field*, 2 B. & Ad. 57, but only to the trustees, their heirs and assigns; and in the previous part of the clause devising to the trustees, the testator expressly declares that he gives it to them in order to prevent the contingent *uses* and *Estates thereinafter limited from being defeated*, and then, after describing the Estates intended to be devised for the benefit of *Flora*, as well as for the benefit of his other children, he again declares that the trustees are to hold the said several sub-divisions and Estates unto the trustees, their heirs and assigns for ever upon trust, nevertheless, and under and subject to the powers, uses provisionary, and limitations thereinafter expressed and declared of and concerning the same.

Where lands are devised to a trustee without words of limitation of the Estate, it depends upon the construction of the Will, whether he is a mere conduit pipe for passing the legal Estate, or whether he takes in fee. If no *duty* or *trust* is cast on him he takes nothing, if a *duty* or *trust* is cast on him the quantity and duration of his Estate depend on the trust or duty imposed Whether the trust is "active" or "passive" is sometimes put as the test, but this (taking the words "active," and "passive" in their ordinary and popular sense) seems not quite accurate; for an authority which is to remain latent until danger to the interest to be protected invokes its exercise, is an "*active*" *trust*. Thus, it is laid down, a devise to A and his heirs, simply in trust, to permit B to receive the rents &c, will, under the Statute of uses, vest the legal Estate in B, but if any *agency* or *control* is to be exercised, or duty performed by A, as to *apply* the rents to a person's maintenance, or in making repairs, or to hold for *the separate use of a feme covert* or to *permit a feme covert* to *receive* the rents for her separate use. A will take the legal Estate, *Whar.* L. Lex. Tit. "Trust." There can be no doubt that under the trusts of this Will a freehold Estate vested in the trustees and that (if the trust in favor of the eldest son is valid) the fee simple vested in and must remain in them until the conveyance to him was executed, as they could not convey unless they had it. But the trust in favor of the eldest son is clearly void as it postpones the *vesting* of his Estate for an absolute period of more than 21 years after a life in being.

The doctrine (always so difficult to apply) of determinable fees, or rather that no greater quantity of legal Estate should be taken by trustees under an indefinite devise than is sufficient for the purposes of the trust, has been abolished by the 30 and 31 sections of the *English* Act 1 *Vic.*, c. 26, which has been re-enacted here, but as this Will was made before the Act came into operation the next question which presents itself must be governed by the old law. That question is whether (the devise in favor of the eldest son being void) the Estate of the trustees did not determine, on the death of *Flora McDonald*, the plaintiff's mother? or at most, at the period of the lessor of the plaintiff attaining 30 years when the trusts for maintenance of the children ceased? In *Doe dem Player v. Nicholls* 1 B. & C. 342, *Bailey*, J., says "it may be laid down as a general rule that when an Estate is devised to trustees for a particular purpose, the legal estate is vested in them as long as the execution of the trusts requires it, and no longer, and, therefore, as soon as the trusts are satisfied it will vest in the persons beneficially entitled to it." The rule, as thus laid down, would seem to include all cases where it had become impossible to do the act the trust was raised to perform, whether the impossibility arose from collateral events, or from causes appearing in or from defects inherent in the Will itself. But in *Doe dem Shelley v. Eldin*, 4 Ad. & Ell. 589, the rule was qualified so as to confine it to cases where, from the words of the instrument, or the apparent intention of the testator, the trustees originally took only such quantity of interest as the purposes of the trust required, and denying changing its application to a case of a fee simple once effectually raised. Lord *Denman*, in giving Judgment after quoting the rule as laid down by *Bailey* and *Holroyd* in *Doe dem Shelley v. Eldin* says, "if the rule above mentioned, as laid down by these Judges, be confined so as to say that the trustees originally take only that quantity of interest which the purposes of the trust require, so far as is expressed by the words of the instrument itself, or by the apparent intention of the maker of the instrument, consistent with the language of it, then I admit the rule to be correct; but if it is meant to apply to all cases in general, where the *trusts* are *no longer* capable of being carried into effect, but, yet, the instrument, by the *legal construction* of it *already gave an Estate which might continue for a longer period* than that during which the objects of the trust had an

actual existence. then that, in my mind, will admit of a different consideration. I admit that for a great number of years past, the Courts have held that trustees take that quantity of interest which the purposes of the trust require, and the question is, not whether the maker of the instrument has used words of limitation, or expressions adequate to convey the Estate of inheritance, but whether the exigencies of the trust require a fee, or can be satisfied by a less Estate." In *Doe dem Codogan v. Ewart* 7 Ad. & Ell. 667, the same Court adhere to the rule thus laid down.

Now what are the trusts here? The first is to protect the daughter's separate Estate during coverture. That would give the trustees a freehold during her life. The next is, to permit the guardians, after her decease, to receive the rents and profits for the maintenance and education of the children, until the eldest son attaining the age of 30 years. That would give the trustees an Estate for years determinable on the eldest son attaining that age. The remaining trust is to convey to the eldest son. In *Doe dem Shelley v. Eldin*, above referred to, the devise was to a trustee in fee, in trust to receive and apply the proceeds to the use of S for her life, and after her decease to convey, as she should by deed or will, appoint. There was no devise over, S died intestate, during the life of the testator without having made an appointment. It was held that the devise being legal did not lapse by the death of S, but, notwithstanding, it had thus become impossible to carry the trust into effect, that the legal estate continued in the trustee. This decision might at first sight appear to govern this case, but it is clearly distinguishable. There the fee simple was required to perform a trust legally raised by the Will, and the fee simple once having a valid subject matter to operate on, necessarily at first vested in the trustees. Here the intended trust from an inherent vice never attained a legal existence and, therefore, a fee simple in the trustees was not required, there never being, for one instant, a subject matter on which it could operate, and, consequently, it never could have vested in them at all. Besides, the testator's plain declaration is, that he gives the Estate to the trustees to prevent the trusts thereinafter limited from being defeated. Now, whatever he might have intended to do, or thought he had done, a trust never really created could be in no danger of being defeated, and no estate in a trustee could be necessary

to preserve it. The two first trusts to protect which (as already observed) the trustees originally took only determinable estates, commensurate to the duration of the trusts having been long since executed and no further trust having ever existed. I think the case falls within the rules as explained in *Doe dem Shelley v. Edlin*, that the object ceasing, the estate of the trustees ceases also, and the lessor of the plaintiff being one of the heirs of the testator, has a right to recover in this action.

On another ground, the lessor of the plaintiff was entitled to recover, where prior possession is sufficient to maintain ejectment against a wrong doer. Here *Donald McIsaac*, the defendant's brother was in possession, and paid rent to the lessor of the plaintiff's mother and to him after her death, thus making himself his tenant; then he abandoned it, whereupon the land in contemplation of law continued in the possession of the plaintiff, when the defendant entered. What right had he to take possession? Who authorized him to go there? He does not say he came in under his brother *Donald* (that would have been an acknowledgment of the plaintiff's right to turn him out) He is a mere wrong doer showing no title good or colorable, and that being the case, he cannot as he attempts to do, set up the old 100 years outstanding lease to third persons against the prior possession of the plaintiff. To entitle him to do so, he was bound to show some title in himself under the lessees of the 100 years term, or some *bona fide colorable* title under which he took possession. But he did nothing of the kind, nor did he offer to call himself to prove by his own evidence how he came there.

There is yet another ground on which I am inclined to think the lessor of the plaintiff is entitled to recover, which is, that the *cypre's* doctrine is probably applicable to the construction of this Will, and if so the lessor of the plaintiff's mother would take an equitable estate bail and he would become legal tenant in bail on her decease subject to the charge for maintenance of children. But the will is a most extraordinary document. It appears as if it had originally been drafted by a not unskilful hand and that the testator after each clause had interpolated his own ideas to explain or enforce what had been before correctly expressed to effectuate his intentions, and the consequence is that very often he destroys provisions which he fancied he was making more binding. But the

labour of analysing 15 or 16 closely written pages, one half of which is mere verbose nonsense, but which nevertheless may exercise some controlling power over more intelligible provisions, is a task which I have declined to undertake, the points on which I have already expressed an opinion being sufficient to decide the case, and the others under the events which have happened not being of much importance to any one.

I think the rule for a nonsuit must be discharged.

EX PARTE ALEXANDER STEWART.

Easter Term, 1871.

Absent debtor suit made a remanet at third term—same effect as if special leave to stand over were granted.

This was an application to set aside a judgment obtained by *J. R. Bourke* against *John Holman*, an absent debtor. It appears that at the third term the cause stood over as a remanet for want of time to try it in its regular order as it stood on the list, but no leave of the Court was obtained to permit it to stand over. *Holman* became insolvent. *Stewart* purchased land of *Holman's* attached in the absent debtor suit and its liability to the lien acquired by the attachment depends on whether the suit abated for want of special leave to continue it.

It was urged that the 2 sec. 20 *Geo.* 3, C 9, is imperative that the trial shall come on at the term unless allowed to stand over by leave of the Court. It is argued that the provision that the cause shall peremptorily come to trial at the third term is for the benefit of the plaintiff to prevent his being delayed, and that *he* is not bound to bring it to trial till he pleases. In practice it has always been considered peremptory with respect to both parties, and I think the practice accords with the intention of the Act. The attachment is a lien on the land from the time any part of the defendant's property is attached, and if the plaintiff after attaching could delay indefinitely to prosecute his suit, an absent person's property might continue for a long time unsaleable in consequence of a mere claim which on trial might prove entirely unfounded. But I think as it was made a remanet

for want of time to try it, it must be considered as ordered to stand over, and that a special application to have it postponed was unnecessary. The purchaser could have searched the Prothonotary's office and found that it was made a remanet. If, therefore, he has neglected to do so before buying, the rule *caveat emptor* applies.

I think the Rule should be discharged.

DUNCAN, HODGSON, & ROBERTSON *vs.* THE MONTREAL ASSURANCE COMPANY.

Michaelmas Term 1871.

Policy partly printed and partly written—Insurance—Warranty—time of sailing—Where ship insured in time, policy covering——— date of sailing from Liverpool—with liberty to sail from Charlottetown not later than the 15th of December, sailed from Charlottetown on the 17th of December—held underwriters not liable—policy partly printed and partly written, all must be construed together if possible, if not the writing prevails.

The facts set forth in this special case are as follows: by a policy partly printed and partly written dated the 4th of April 1870, the defendant insured the plaintiff's ship, the "New Dominion." The adventurer to begin at and from "*Liverpool G. B. for the space of ten Calendar months from the date of sailing with liberty to sail from Charlottetown not later than the 15th of December.*"

The last clause of the printed portion of the policy is as follows: "not allowed under this policy to enter the Gulf of St. Lawrence before the 15th of April, or to be in the said Gulf after the 15th day of November, nor to proceed to Newfoundland after 1st of December, or before the 15th of March without payment of additional premium and *leave first obtained*, war risks and sealing voyages excepted. N. B—The Gulf of St. Lawrence to include also the Straits of Northumberland, shall be defined to be inwards from a line drawn from Cape North to Cape Race, and a line drawn from Sand Point at the Strait of Canso to Cape North." P.E. Island lies within the Gulf of St. Lawrence. The ship did not sail from Charlottetown until the 17th of December, passed safely out

of the Gulf of St. Lawrence, and was subsequently lost while proceeding on her voyage from Charlottetown, on the coast of Great Britain.

For the defence, it is contended that the written clause to sail from Charlottetown not later than the 15th of December constituted a condition or warranty not to sail after that date, which being broken, the plaintiff cannot recover.

For the plaintiff, it is urged that this being a time policy, the printed clause "not to be in the Gulf after the 15th of November," was not a warranty, but only an exception which would suspend the risk during any period she might be in the Gulf of St. Lawrence after that date, leaving it to attach again, as soon as she got safely out of it, and that the writing was only intended (in the event of the vessel being in Charlottetown) to exclude the time fixed by the printed clause to the 15th of December with an addition of such time as according to the ordinary course of Navigation would be necessary to get out of the Gulf after leaving Charlottetown

A good deal of argument also took place as to whether the the printed clause or the writing was to have the greater effect. The general rule is that if the whole contract can be construed together so that the written words and the printed make an intelligible contract, this construction should be adopted, but if what is written conflicts with what is printed, the writing controls what is printed; it being (as Mr. Greenleaf observes) the immediate language and terms selected by the parties themselves for the expression of their meaning, while the printed formula is more general in its nature, applying equally to their case and that of all other contracting parties on similar subjects.

It is evident that to adopt the plaintiff's construction great liberty must be taken with the language of the contract; not only must the time be extended, but a new clause must be added, *i. e.* "*the addition of such reasonable time after the 15th of December as according to the usual course of navigation would be necessary to get out of the Gulf.*" But there seems to me no occasion for giving more effect to the written than to the printed clause, nor for attempting to add or to alter the language of either, as full effect may with perfect consistency be given to each. The printed form contains the conditions and regulations adapted to general cases, applying to ports high up the Gulf of St. Lawrence where after the

15th of November the dangers of navigation are great, as well as to those lower down, where until a later period, they are less. Looking at this, and contemplating the possibility of the vessel being in Charlottetown, the written stipulation engrafts on the contract as printed, a special provision, applicable to the risk from this particular port, *viz*, for the benefit of the assured, a *privilege*, or *liberty*, which the general terms of the printed policy would not give, but expressly excluded, of sailing from Charlottetown in and through the Gulf of St. Lawrence not later than the 15th of December; thus simply—in this one event—excepting the vessel from the operation of the subsequent general, printed clause, which prevents her entering the Gulf of St. Lawrence before the 15th of April, or being in it after the 15th of November, but leaving her in all other respects subject to its operation. This construction gives every clause of the policy an intelligible meaning. as the ship might then leave Charlottetown on the 15th of December, the sea risk attaching the moment she got out of the harbor, and the printed clause continuing in full force, would prevent her sailing from any other port in the Gulf so as to be in it after the 15th of November, or from entering it again before the termination of the policy, whilst if she remained to winter in Charlottetown, she would be ordered by the policy against the harbor risks until its termination in February.

The liberty to leave Charlottetown *not later than the 15th of December* is given in the most clear and unmistakable language, and as she could not leave it without passing through the Gulf, it seems evident that the intention of the parties must have been in accordance with this construction, *i. e.*, that in this one contingency, of the vessel happening to be in Charlottetown the printed clause was not to apply to her at all, *provided* she sailed from thence by the 15th of December, but with respect to all other ports, and in all other events, it should continue binding. The policy then construed is what is called a mixed policy, partaking of the nature of both a time and a voyage policy, of the nature of a time policy in its general scope and effect, that is after sailing from Liverpool she does not enter the Gulf before the 15th of April, or be in it after the 15th of November &c., it continues strictly a time policy of the nature of a voyage policy, particularly in reference to this case, when the ship is at Charlottetown in a

position to enable the insured to avail himself of the liberty granted of sailing from thence, and he desires to do so because it then becomes essentially connected with the commencement of that voyage, and must therefore, as regards such voyage from Charlottetown, be governed by the established principles of law applicable to voyage policies, and subject therefore to all the consequences attendant on a non separature under a voyage policy within the time limited by the policy.

Then do the words of the written liberty in this policy constitute a condition or warranty? I am clearly of opinion that they do.

In *Pettigrew v. Pringle* 3 B & Ad. 514, the rule to which the policy referred, provided that the vessel should not sail after the 1st of September for certain ports in British North America; there were two *termini* to the voyage, but a very wide range of ports at both ends; it was a time policy from the 20th of February 1828 to the 20th of February 1829; the vessel might have run under it as a pure time policy for 6 months, when on the 29th of August an intention to sail for British North America calls the rule as to the period of departure for British North America into operation, and converted it *quo ad* the intended voyage into a voyage policy. It was not disputed that the provision not to sail after the 1st of September was a warranty.

Collidge v. Hartz 6 Exch. Rep. W. H. & G. 207, was a time policy for a year among several stipulations as to time of sailing, one was not to sail for any port in the Baltic between certain dates in December and February, there was no *terminus a quo* but only *ad quem*, respecting this particular prohibition. The vessel had run under the policy for nearly a year; when, sailing for a Baltic port, at the prohibited time, she was lost, the plea did not aver that the loss was *within* the prohibited period. It was held a warranty and not an exception, and therefore such averment was unnecessary. The vessel might have been in any part of the world, but if she *sailed for* the prohibited Belts the warranty would have been broken. That case was the converse of the present, in this, that here, the prohibition is *from* a certain port, but where is the difference in principle? Besides, the 9th rule also contained a prohibition as to sailing from the Baltic port between certain periods, but fixing no *termini ad quem* Had she violated the rule by sailing after the prohibited date

from this place in the Baltic it would equally have vitiated the policy. Now this is exactly the case here, a time policy, but not to sail from Charlottetown after the 15th of December.

Many of the cases decided on charter parties where the contention was whether the time of sailing formed a condition precedent or not are applicable to the present case. In *Ollive v. Booker* 1 Exch. Rep. 416, an action for not loading a vessel in pursuance of the term of a charter party by which it was agreed between plaintiff "original charterer of the good ship Dove *now at sea having sailed three weeks ago*," and defendant. It was held that the time at which the vessel sailed was material, and that the statement in the charter party amounted to a warranty. *Parke* B. says "in the construction of agreements as in the case of contracts under seal we should endeavor to discover the intention of the parties. Here it is stated that the vessel was now at sea having sailed three weeks; and if time is the essence of the contract, no doubt it is a warranty and not a representation. Such also is the case of policies of insurance. It appears to me that it is a warranty and not a representation, that the vessel had sailed three weeks. It is, therefore, a condition precedent. This leaving a condition precedent, and not performed, the defendant was not bound to load the vessel. I entirely agree with the reasoning of the Chief Justice in *Glaholm v. Hays*."

Glaholm v. Hays was assumpsit on a charter. The words of the charter were the vessel to sail from *England* on or before the 4th of July then next. It was held that the sailing on or before the 4th of July was a condition precedent. *Per Tindal* C. J. "the very words 'to sail on or before a given day,' do, by *common usage* import the same as the words '*conditioned to sail*,' or '*warranted* to sail on or before such a day'; and undoubtedly, if in the wording of a common bought and sold note, for a cargo of corn, or any other goods, were found the words 'to be delivered on or before such a day' they would be held to amount to a condition; and the purchaser would not be bound to accept the cargo, if not ready for delivery by the day appointed. And looking at the subject matter of the contract, without regarding the precise words, we think that construing the words as a condition precedent, will carry into effect the intention of the parties, with more certainty than holding them to be mere matter of

contract only, and merely the ground of an action for damages." And again "upon the whole, therefore, we think the intention of the parties to this contract sufficiently appears to have been to insure the ship's sailing at latest by the 4th of July, and that the only mode of effecting this is by holding the clause in question to form a condition precedent; which we consider it to have been."

In *Crookewit v. Fletcher*, 1 H. & N. 912, the words were to sail from Liverpool *on or before* the 15th of March next, the exception was as follows, "restrictions of princes and dangers of wreck, act of God &c., *throughout* this charter-party always excepted." It was held that notwithstanding the words "throughout this charter-party" the sailing of the ship on the 15th of March was a condition precedent to the obligation of the defendant to load the ship. In giving Judgment the Court says, "If the word 'throughout' had not been in the charter-party, the case of *Glaholm v. Hays* is a direct authority expressly in point, that the stipulation for the sailing on the 15th of March was a condition precedent, and this case has been acted upon in two cases in this Court. *Ollive v. Booker*, and *Oliver v. Fletcher*. If we had thought this decision not correct, we should nevertheless have considered ourselves bound by it; but we entirely concur in it, and are of opinion that it was rightly decided, and that any other construction of the charter-party would lead to most mischievous consequences. All mercantile contracts ought to be continued according to their plain meaning to men of sense and understanding, and not according to forced and refined construction which are intelligible only to lawyers, and scarcely to them."

The reasoning of the Judges in those and many other cases applies with equal force to similar cases on policies of insurance. Every mercantile man understands the words "to sail by a certain day" or "not later than a certain day" to be an express agreement that such stipulation shall be performed, and to throw doubt on a rule so well understood, would be attended with most mischievous consequences, as it would render the exact limits of an underwriter's liability as well as the assured's rights in many cases doubtful, and thus introduce uncertainty on a point of mercantile law where it is most important that none should exist.

By the written provision here (as in the case of *Baines v. Holland* 10 H. & G. 806) the sailing from Charlottetown is

made as it were a new starting point for the further continuance of the risk and must necessarily be governed by the same rule that would have prevailed supposing the policy instead of providing for the beginning of the adventure "at and from *Liverpool* G. B. for the space of 10 calendar months from the date of sailing" had these words added, "warranted to sail," or, "provided she sailed," or, "the vessel to sail before the 10th day of April," or any other date, or, if the words we are now considering had been added and the policy had read thus "for ten calendar months from the date of sailing with liberty to sail from *Liverpool* not later than the 15th of April" and she had sailed after the day named is, it not quite clear that in any such case the policy would not have attached? For the simple reason that by sailing after the time limited the risk was altered from that which was intended by all the parties when the policy was effected. So in this case, the sailing from Charlottetown not later than the 15th of December is the basis of this part of the contract, and *time* is of the essence of the contract. By sailing after the 15th of December the assured substituted another risk for the only one which, if the vessel was at Charlottetown after the time limited in the printed clause and sailed therefrom, was insured. It is quite obvious that had the vessel not sailed under the liberty granted, or in defiance of it, she must have remained at Charlottetown until long after the risk expired by effluxion of time and so the insurers would practically have been liable only for harbor risks. But the *increase* or *diminution* of the risk is wholly immaterial, the time question is, has the risk been varied, has the condition been *strictly* and literally performed? "The warranty (says Mr. Arnold 553) in a contract of insurance,is a condition or a contingency,and unless that is performed, there is no contract. Inquiry into the materiality or immateriality to the risk of the thing warranted is entirely precluded, and so are all questions as to substantial compliance. By a breach of warranty, therefore although the loss may not have been in the remotest degree connected with it the underwriter, is none the less discharged on that account from all liability. A ship warranted to sail with convoy had in fact sailed without it and went down in a storm, the underwriter was nevertheless held not liable for the loss."

A ship was insured on a slaving voyage at and from *Africa* to her port or ports of discharge in the *West Indies*, and a

memorandum was inserted in the margin of the policy that the ship had "sailed from *Liverpool* with 14 six pounders swivels, small arms, and fifty hands or upwards, copper sheathed," the ship had actually sailed from *Liverpool* with only forty six men, but within twelve hours afterwards she had taken on board at *Beaumaris*, six additional hands. The Court unanimously held that it was a breach of an express warranty for the ship to sail from *Liverpool* with only forty six men, and the policy was. therefore, void.

Here the contract was to insure the vessel on condition that she sailed from Charlottetown not later that the 15th of December, that condition was not performed, and, therefore, the plaintiff can have no right to recover against the defendants on a risk against which they did not undertake to indemnify.

On the argument it seemed to be assumed that had the printed clause, prohibiting the vessel "from entering the Gulf of St. Lawrence before the 15th of April, or being in it after the 15th of November, stood alone, it would have been an exception and not a condition, the breach of which would only suspend, not terminate the risk. In one sense it is quite true, as was argued, that there can be no deviation on a time policy because there is no prohibited track to deviate from, but Mr. *Parsons* observes "that although 'deviation' in the law of insurance *originally* meant only a departure from the course of the voyage, it is now always understood in the sense of a material departure from, or change in the risks insured against without just cause. There *may* be a *deviation* while the ship is in port, or where the insurance is on time no voyage being indicated." Now looking, as I must do, at the peculiar kind of danger (viz., from ice) likely to be encountered by vessels navigating many parts of the Gulf of St. Lawrence between the 15th of November and the 15th of April, and considering the difficult questions which often arise where a vessel receives her death wound, or is seriously injured before the expiration a time policy, but is actually lost after it expires and that injuries from ice might often give rise to similar questions from their being of a kind that would render it very difficult to decide on, for such injuries might have contributed to her ultimate loss. It might at least be open to contend that the underwriters never could have intended to subject themselves to risks so uncertain, or to liabilities so difficult to be ascer-

tained. And also particularly looking at the language of the latter part of this printed clause, "not to enter the Gulf &c. without payment of additional premium and *leave first obtained*" words very much stronger than those which in *Graham v. Barras*, 5 B. & Ad. 1012, were held to render the previous assent of the underwriters to accept the additional premium necessary to an extension of the time for sailing. It seems to me by no means clear that this printed clause is not in itself a warranty. But I express no opinion on this point, and I have only alluded to it to guard against being understood, by the many persons who, I presume, are now insuring under similar policies, that stipulations such as this can be violated without danger of discharging the underwriters from all subsequent liability.

The Judgment must be for the defendants.

HALL & HEARD *vs.* PRINCE EDWARD ISLAND MARINE INSURANCE COMPANY.

Michaelmas Term 1871.

Insurance—Construction total loss—cargo damaged, landed, and sold, but no evidence given to show that it could not have been forwarded, or that if forwarded its value at the point of destination would not exceed the salvage and other expenses—held plaintiffs could not recover for a total loss.

This was an action on a policy of insurance. The vessel was bound for the *West Indies* with a cargo of Fish and valued at £1000, and having received damage by stranding in getting out of *Charlottetown* Harbor was caught in the Ice pack in *Northumberland Straits*, where she remained drifting about all winter whereby the cargo was damaged; and got into *Halifax* in May. The owners gave the under writers notice of abandonment, and the captain with the consent of *Heard*, one of the owners of the cargo and also the owner of the vessel, sold the cargo at *Halifax* for the benefit of all concerned, and now claim for a constructive total loss.

The rule as laid down in *Rosetto v. Gurney* 11 C. B. 176, and which is confirmed by *Farnworth v. Hyde*, 2 L. Rep. C. B. 217, is that where goods are damaged the question for the Jury to determine is "was it practicable to send the whole or any part of the cargo to its place of destination in a marketable state" and that to determine that question the Jury must ascertain the cost of unshipping the cargo, the cost of drying and warehousing it, the cost of transporting it in a new bottom (when necessary) and the cost of the difference of transits, if it can be effected at a higher than the original rate of freight, add to those items the salvage allowed in proportion to the value of the cargo saved and the loss will be total, if the aggregate exceed the value of the cargo when delivered at the port of discharge, but if the aggregate do not so exceed the value of the cargo or of the part of it saved, the loss will be partial only.

Now, in this case, the plaintiffs' evidence was defective in two most most material points. First, as to the state of the

fish and the extent of the damage it had sustained, as the testimony of their witnesses shewed that they had formed their opinions as to its state without opening the packages or taking proper means to ascertain their real condition. Again, the plaintiffs' evidence to show that there were no facilities for drying the fish in *Halifax*, was of the most flimsy description, consisting of the opinions of persons here who could not state what the extent of the facilities really was.

Secondly. no evidence was given of what the probable value of the fish, when dried and repacked, would have been at the port of destination. And this was opposed by the testimony of others, particularly *West* and *Cronan*, two merchants of *Halifax*, who bought a very large portion of the cargo at prices lower, but not so very much lower, than the invoiced value, who had it redried and repacked and shipped it to the *West Indies*, and who state that the packages of fish (with a few exceptions) though discolored on the outside, were not much injured, and that they only required a day or two airing and drying before repacking.

I think it clear that there was no evidence justifying the Jury in finding a total loss.

There is no doubt there was a partial loss. The defendants have paid £100 into Court, but there is no evidence whatever of what the salvage expenses on a partial loss, *viz.*, for drying, repacking, &c, would have been and, therefore, we are entirely without materials for forming a Judgment as to whether the partial loss does or does not exceed that amount.

The rule for a new trial must be absolute.

IN THE MATTER OF THE PETITION OF JOHN HODGES WINSLOE,

FOR PARTITION OF CERTAIN LANDS IN QUEEN'S COUNTY.

Chambers, Feb. 1872.

In this case, Mr. *Bayfield*, Attorney for the petitioner, applied under 18 *Vic.*, c. 18, and 27 *Vic.*, c. 27, for an order for the co-devisees of the petitioner to appear and answer the petition The petition states that the petitioner and his brothers and sisters are (under the will of their father, *Alfred Winsloe*, deceased) entitled to the lands in the schedule to the petition annexed, described in fee, but not setting forth the substance of the devise with any certainty of allegation or alleging that the will is executed and attested in such manner as is necessary to pass real estate.

The affidavit merely alleges that the facts stated in the petition are just and true.

I am of opinion that the petition and the affidavit are insufficient to entitle the party to the order prayed.

These statutes have substituted this mode of proceeding in lieu of the tedious and expensive proceedings by writ of partition so that the Court or a Judge may at once appoint Commissioners to make partition without resorting to the writ, declaration, and plea, and the intervention of the sheriff and jury. But the Act never could have intended to do away with the necessity of showing in the petition a title to demand a partition with the same certainty as was necessary in a declaration in partition at Common Law. I think that such part of the will as relates to the devise, under which the petitioner claims, should be set out in the petition. So that the Court may see whether the devisees take in fee simple or otherwise, and whether as joint tenants or tenants in common, or otherwise. And, also, that there should be a distinct allegation in the petitions that the will was executed and attested in such manner as is necessary to pass real estate.

I am also of opinion that the affidavit is insufficient. The 2 sec. of 27 *Vic.*, c. 27, requires the petition to be verified by affidavit. The verification does not mean a bold, general

statement that the allegations in a pleading are true, but a statement under oath of facts or circumstance which, taken together, prove the allegations to be true, from which the Court or Judge may be satisfied that the party applying has a *prima facie* case for the defendants to answer.

For these reasons I decline to grant the order, but the petitioner may amend his petition and affidavit and apply again.

THE END.